

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.11. 2020

DELIVERED ON : 03.12.2020

CORAM

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

C.R.P(PD)No. 3812 of 2015

and

M.P.No.1 of 2015

1. Kannaiyan

2.Susila

... Petitioners /Defendants

Vs.

Periyasamy

... Respondents / Plaintiff

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, against the fair and decreetal Order dated 21.07.2015 in I.A.No.17 of 2015 in O.S.No.316 of 2009 on the file of the District Munsif Court, Namakkal.

For Petitioners

: M/s.S.Kalyanaraman

For Respondent

: M/s.T. Dhanyakumar

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ORDER

This Civil Revision Petition has been filed by the petitioners/defendants against the dismissal of their application in I.A.No.17 of 2015 in O.S.No.316 of 2009 on the file of the Additional District Munsif, Namakkal, dated 21.07.2015.

2. The petitioners herein had filed an application in I.A.No.17 of 2015 in O.S.No.316 of 2009 on the file of the Additional District Munsif, Namakkal, under Section 5 of the Limitation Act to condone the delay of 1637 days in filing petition to set aside the exparte decree dated 03.03.2010. The learned District Munsif by the order dated 21.07.2015 had dismissed the said application without costs. Feeling aggrieved, the petitioners / defendants have filed the present Civil Revision Petition.

3. Heard Mr.S.Kalyanaraman, learned counsel for the petitioners and Mr.T. Dhanyakumar, learned counsel for the respondent.

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4. The learned counsel for the petitioners has submitted that the respondent herein had filed a suit in O.S.No.316 of 2009 on the file of the Additional District Munsif, Namakkal, for the relief of mandatory injunction and also for permanent injunction. He further submitted that after receipt of summons in the said suit, the petitioners instructed one Mr.V.K.Arivazhagan, Advocate, Namakkal, to conduct the case on their behalf and also the said Advocate got signatures from the petitioners in a vakalat and assured that he will conduct the case for the petitioners who are illiterates. Whenever they met the said Advocate, he informed them that the case is still pending. Subsequently, they received court notice twice from the court and they had shown the said notices to the said Advocate and at that time also, he informed that the court will issue notice at every stage and instructed them to give the said notice to him whenever they received and also got signatures in the vakalat.

5. The learned counsel for the petitioners further submitted that on 29.09.2014, the petitioners received a letter from one Mr.S.Periyasamy, Advocate, Namakkal. The first petitioner has shown the said letter to his

co-brother. The co-brother of the first petitioner after going through the said letter told the petitioners that the respondent got decree against the petitioners on 03.03.2010 itself and filed an execution petition and only in the said execution petition, the said Advocate, Mr.S.Periyasamy was appointed as an Advocate Commissioner. Thereafter, the petitioners engaged another counsel and verified the court records and came to know that the said Mr.V.K.Arivazhagan, Advocate had engaged one Mr.A.Elangovan, Advocate, by using the said vakalat which was obtained from the petitioners and took adjournments for filing written statement. Since the petitioners have not filed written statement, the court set them exparte and passed an exparte decree on 03.03.2010. He further submitted that the same Advocate has engaged another Advocate Mr.S.Anbarasan by using the vakalat which was obtained subsequently from the petitioner and made an endorsement as 'no objection for amending the decree'.

6. The learned counsel for the petitioners further submitted that since the petitioners are illiterates, they reposed confidence in

Mr.V.K. Arivazhagan, but he acted against the interest of the petitioners and defrauded them and hence, the petitioners immediately filed an application to set aside the exparte decree with an application under Section 5 of the Limitation Act to condone the delay of 1637 days but the trial court without considering the aforesaid facts, had dismissed the said delay excuse petition. He further submitted that the petitioners are having valid defence in the suit. He further submitted that in the judgment passed by the trial court, it is simply stated as PW1 Periyasamy Pillai was examined on proof affidavit. Exs.A1 to A7 and C1 & C2 were marked. Claim proved. Suit is decreed as prayed for with costs. It has not discussed about the merits of the plaintiff's case and on that ground also, the said decree has to be set aside and therefore, he prayed to allow this CRP and set aside the order passed by the trial court in I.A.No.17 of 2015 and give an opportunity to the petitioners to contest the suit.

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7. Per contra, the learned counsel for the respondent/plaintiff has submitted that the petitioners are adjacent land owners of the respondent and they encroached a portion of the respondent's property admeasuring

5x20 feet and put up a construction and hence, the respondent had filed a suit in O.S.No.316 of 2009 for the relief of mandatory injunction directing the petitioners herein to remove the said encroachment and also for permanent injunction. He further submitted that in the said suit, summons were duly served on the petitioners and after receipt of summons, the petitioners entered appearance by filing vakalat through one Advocate Mr.A.Elangovan and took adjournments for filing written statement and finally they did not file written statement and remained exparte and hence after examining the respondent as PW1 and perusing the documents which were filed by the respondent, passed an exparte decree on 03.03.2010. He further submitted that subsequently the respondent had filed an application in I.A.No.1311 of 2012 to amend the said decree and in the said application, notice was sent to the petitioners. The petitioners received the said notices and entered appearance through one Advocate Mr.S.Anbarasan and made an endorsement as 'no counter' and accordingly, the said application was allowed on 03.06.2013.

8. The learned counsel for the respondent has further submitted that the respondent had filed an execution petition to execute a decree for mandatory injunction and in the said EP also, notice was sent to the petitioners. But after receipt of notice in the EP, they did not appear and remained exparte and hence, the executing court had appointed one Mr.S.Periyasamy, Advocate for removing the said encroachment and only with a view to prevent the respondent from enjoying the fruits of the decree, the petitioners had filed an application in IA.No.17 of 2015 after 4½ years without assigning any valid reason. He further submitted that the petitioners had made allegations against one Mr.V.K.Anbazagan, Advocate, Namakkal, but they have not produced any material to substantiate the said allegations. He further submitted that only for the purpose of this application, they have stated some false allegations and taking into consideration the aforesaid facts, the trial court had rightly dismissed the petitioners' application and in the said order, this court need not interfere and therefore, he prayed to dismiss this Civil Revision Petition.

9. This Court has carefully considered the rival submissions made by the counsel for both sides and perused the materials filed along with this Civil Revision Petition.

10. A perusal of the typed set of papers filed by the petitioners show that the respondent herein had filed a suit in O.S.No.316 of 2009 on the file of the Additional District Munsif, Namakkal, stating that the petitioners herein encroached a portion of the property ad measuring 5x20 feet and put up a construction and hence the said encroachment should be removed by way of mandatory injunction and the petitioners herein should be restrained by means of permanent injunction from making any encroachment in the suit property. In the said suit, summons were served on the petitioners herein. After receipt of the summons, the petitioners herein entered appearance by filing vakalat through one Mr.A.Elangovan, Advocate, Namakkal and took adjournments for filing written statement but finally they did not file written statement and hence, they were set exparte. Thereafter, the trial court had examined the respondent herein as PW1 and marked as many as 7 documents as

Exs.A1 to A7 on the side of the plaintiff and also marked the Advocate Commissioner's report and plan as Exs.C1 and C2. After considering the evidence of PW1 and the aforesaid documents, the trial court came to the conclusion that the claim is proved and accordingly, decreed the suit as prayed for with costs on 03.03.2010. Thereafter, it appears that the respondent herein/plaintiff had filed an application in I.A.No.1311 of 2012 to amend the said decree and in the said application also, notice was sent to the petitioners herein and after receipt of the notice, the petitioners herein engaged one Mr.S. Anbarasan, Advocate and the said Advocate made an endorsement as 'no counter' for allowing the said application and accordingly, the said application was allowed on 03.06.2013. Thereafter, the respondent herein had filed an execution petition for executing the decree for mandatory injunction and in the said Execution Petition, notices were sent to the petitioners. The petitioners have received the said notices, but they did not appear in the said Execution Petition and the Executing Court had appointed one Advocate, Mr. S. Periyasamy for removing the encroachment and only thereafter, the petitioners had filed an application in I.A.No.17 of 2015 under

Section 5 of the Limitation Act to condone the delay of 1637 days in filing petition to set aside the exparte decree.

11. In the affidavit filed in support of I.A.No.17 of 2015 in O.S.No.316 of 2009, the petitioners did not say that they have not received any summons in the suit. On the contrary, they have stated that they received summons in the suit and approached one Advocate Mr.V.K.Arivazhagan of Namakkal and the said Advocate got signatures from them in vakalat and he assured them that he will defend the case on their behalf. They further stated that subsequently they received another notice from the same court and they handed over the said notice to the said Advocate and at that time also, he got signatures from them in a vakalat by saying that at every stage, notice will be sent by the court and instructed them to hand over the said notices as soon as they received the same. They also stated that for the third time also, they received notice from the court and at that time also, they handed over the said notice to the same Advocate and at that time also, he got signatures in the vakalat. They further stated that on 29.09.2014, they received a letter from one

Mr.S.Periyasamy, Advocate of Namakkal and the first petitioner had shown the said letter to his co-brother and his co-brother, after going through the said letter informed them that the respondent got a decree in the suit as early as on 03.03.2010 itself and only thereafter they verified the court records through the Advocate and came to know that the said Mr.V.K.Arivazhagan, Advocate did not appear in the said case and on the contrary, he engaged one Mr.A.Elangovan, Advocate in the suit and after taking several adjournments for filing written statement, finally allowed the suit for passing exparte decree. They also stated that the said Mr.V.K.Arivazhagan, Advocate had engaged another Advocate Mr.S.Anbarasan by using second vakalat in I.A.No.1311 of 2012 and made an endorsement as 'no counter' and accordingly, the said I.A was allowed on 03.06.2013. They also stated that in the execution proceedings, the said Advocate, Mr.V.K.Arivazhagan did not file any vakalat. But to substantiate the allegations that after receipt of suit summons, they approached one Advocate Mr.V.K.Arivazhagan of Namakkal Bar and instructed him to appear on their behalf and also signed in the vakalat and subsequently, when they received notices from

the court also, they approached the same Advocate and signed in the vakalat but he did not appear on their behalf, they have not produced any materials before the court. The aforesaid allegations are contrary to the evidence available on record.

12. The records would show that after receipt of summons, the petitioners engaged one Advocate Mr.A.Elangovan and took adjournments for filing written statement but finally they did not file written statement and hence the court set them exparte and passed an exparte decree on 03.03.2007. Subsequently, the respondent had filed an application in I.A.No.1311 of 2012 to amend the decree and in that application also, notices were sent and the petitioners had admitted in the affidavit filed in support of the application in I.A.No.17 of 2015 that they received the said notices also and gave vakalat to Mr.V.K.Arivazhagan. Advocate. But they themselves admitted in the said affidavit that by using the said vakalat, the said Advocate Mr.V.K.Arivazhagan had engaged one Mr.S.Anbarasan, Advocate and

finally made an endorsement as 'no counter' for allowing the said application. Further, they also admitted that they have received notices in the Execution Petition also.

13. In the affidavit filed in support of the I.A.No.17 of 2015, the first petitioner has stated that he received a letter on 29.09.2014 from one Advocate Mr. S. Periyasamy and he shown the said letter to his co-brother and his co-brother after reading the said letter, informed him that the respondent got a decree as early as on 03.03.2010 itself and only thereafter, they came to know that an exparte decree was passed on 03.03.2010 itself. The aforesaid averments would show that the first petitioner is having the benefit of service of his educated co-brother. So, in earlier occasions also, the first petitioner would have availed the service of his educated co-brother. Therefore, the contention of the petitioners that they are illiterates and hence, they believed and acted on the words of one Advocate Mr.V.K.Arivazhagan, cannot be accepted.

14. It is also to be pointed out that in paragraph No.4 of the affidavit, the first petitioner has stated that after knowing the fact that an exparte decree was passed on 03.03.2010, they verified the records through an Advocate but they have not stated through which Advocate they have verified the records. Further, they have not produced any material before the court that they have filed any memo before the trial court and obtained permission for verifying the court records. Therefore, the allegations that after receipt of the letter from Advocate Commissioner Mr. S. Periyasamy, petitioners have verified the court records and came to know that the said Mr.V.K.Arivazhagan engaged Mr.A.Elangovan in the suit and thereafter the said Mr.V.K.Arivazhagan. had engaged Mr.S. Anbarasan in I.A.No.1311 of 2012 appears to be false. After waiting for 4½ years, the petitioners had filed an application to set aside the exparte decree by making allegations against one Advocate Mr.V.K.Arivazhagan, without impleading him as a party and without any materials.

15. When the petitioners have not come to the court with clean hands and the averments made in the affidavit are totally devoid of truth and lacking bonafide, definitely such a case is not an exceptional case warranting a liberal approach in condoning the delay or showing any leniency. In so far as the contention of the learned counsel for the petitioners that trial court has not discussed the evidence in the judgment passed in the suit and hence the said judgment and decree are liable to be set aside also does not merit acceptance. It is well settled that in dealing an application to set aside the exparte decree or condoning the delay in setting aside an exparte decree, the court will not deal with the merits of the case. Even assuming that the said judgment and decree are not valid, the petitioners have to file an appeal challenging the validity of the said judgment and decree and instead of that, they cannot challenge the said judgment and decree in the application which is filed under Section 5 of the Limitation Act to condone the delay in filing petition to set aside the exparte decree.

16. For the aforesaid reasons, this Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

03.12.2020

Index:Yes/No
Internet:Yes/No
Speaking/Non-speaking Order
gv

To

The District Munsif Court, सत्यमेव जयते

Namakkal.

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C.R.P(PD)No. 3812 of 2015
and M.P.No.1 of 2015

P.RAJAMANICKAM, J.

gv



**Pre-Delivery Order made in
C.R.P(PD)No. 3812 of 2015
and
M.P.No.1 of 2015**

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