

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.06.2020

CORAM

THE HON'BLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

C.M.A.No.3301 of 2019

and

C.M.P.No.19213 of 2019

Amrita Sanjeevi ...Appellant /3rd Defendant

Vs

1.M. Periya Thambi Gounder

2.M.Senthilprabhu

...Respondents/Plaintiffs

Civil Miscellaneous Appeal is filed under Order 43 Rule 1 of the Code of Civil Procedure to set aside the Order and Decreetal order passed in I.A.No.679 of 2017 in O.S.No.641 of 2008, dated 23.10.2017 on the file of the learned Principal District Judge, Coimbatore.

For Appellant : Mr.M.L. Ramesh

For Respondents : Mr.K.R. Samratt

JUDGMENT

The appellant/3rd defendant herein has filed this Civil Miscellaneous Appeal against the order and decreetal order dated 23.10.2017 dismissing the petition filed under Order IX Rule 13 of the Code of Civil Procedure in I.A.No.679 of 2017 in O.S.No.641 of 2008 on the file of the learned Principal District Judge, Coimbatore, by raising various grounds.

2.Initially, O.S.No.641 of 2008 has been filed by the plaintiffs/respondents for declaration that the plaintiffs/respondents are the absolute owners of the property described in the schedule mentioned property therein, restraining the appellant and defendants therein from interfering with the respondent's peaceful possession and enjoyment of the suit property or by any other illegal means by means of a permanent injunction, and to declare the Sale Deed dated 09.02.2000 and registered as Document No.343/2000 at the office of the Sub Registrar, Gandhipuram, to declare the Sale Deed dated 11.08.2000 and registered as document No.2186/2000 at the office of the Sub Registrar, Gandhipuram, executed by D. Balasubramaniam in favour of K.Ramachandran, as null and void and further to declare that the Sale Deed dated

24.08.2007 and registered as Document No.5312/2007 at the office of Sub Registrar Gandhipuram executed by Ramachandran and Seethalakshmi in favour of the 3rd defendant as null and void.

3. Thereafter, on 26.08.2013, the appellant/3rd defendant has filed her Written Statement. In the Written Statement, it is stated that she has purchased the suit property as per the Sale Deed dated 24.08.2007 and the vendors to this appellant/3rd defendant have purchased the said property as per four Sale Deeds. After purchase, the appellant/3rd defendant has put a temporary shed and fence over the entire property. Due to difference of opinion between the 3rd defendant and her husband, the respondents have filed this suit with false allegations. Further, the suit is barred by limitation. It is further contended in the said Written Statement that the respondents have failed to find their property which they said to have been purchased in the year 2002. The 3rd defendant further contended that while passing ex parte Judgement, no summons was served to the 3rd defendant. The respondents are not entitled to get the reliefs as prayed in the Plaint.

4. On 25.10.2016, the learned Principal District Judge, Coimbatore, while decreeing the suit as prayed for has observed that,

"On going through the case records, initially the defendants 1 and 2 are remained ex parte. As regards the 3rd defendant, after filing the Written Statement, she has not chosen to appear before the learned Principal District Judge, Coimbatore for cross examination of P.W.1. In spite of repeated adjournments, the 3rd defendant has not chosen to appear before this Court. Hence, the attitude of the 3rd defendant presumes that she admitted the averments made in the Plaint by the plaintiffs and the suit was decreed as prayed for by the plaintiffs".

5. Aggrieved against the said Judgment, on 02.06.2017, the appellant/3rd defendant has filed I.A.No.679 of 2017 to set aside the ex parte decree passed in O.S.No.641 of 2008 and the same was dismissed by the learned Principal District Judge, Coimbatore, without costs on 23.10.2017. As against the said order, the appellant/3rd defendant has filed this appeal seeking to set aside the Order and Decreetal order passed in I.A.No.679 of 2017 in O.S.No.641 of 2008, dated 23/10/2017 on the file of the learned Principal District Judge, Coimbatore.

6. In the Grounds of the present Appeal, the appellant had submitted that the Lower Court has failed to see that the petition filed under Section 5 of the Limitation Act with the

same averments was allowed with costs and the respondents has not made any objection in allowing the petition. Further, the learned trial Judge had misdirected in considering the earlier happenings in the suit with respect to the appellant being set ex parte and this Court granted opportunity to the appellant herein. The trial Judge has not considered whether the reasons set out in the present petition can be accepted and the ex parte order could be set aside. Only due to the raid conducted by Vigilance and Anti-corruption Department and arresting of the husband of the appellant/3rd defendant, she was not able to give instructions to cross examine P.W1. The learned trial Judge had misdirected in disbelieving the contentions made by the appellant, when the same had not been denied by the respondents/plaintiffs and accepted the same contentions made in earlier I.A.No.506 of 2017. If the ex parte decree is not set aside the appellant/3rd defendant will be put to great hardship. The learned trial Judge has failed to see that the valuable property is being lost by the appellant/3rd defendant if she is not given a fair opportunity in contesting the suit.

7.It is seen from the arguments of the appellant herein that she is the 3rd defendant in the suit in O.S.No.641 of 2008 filed by the respondents seeking the relief of cancellation of the Sale Deeds which was registered as Document No.5312/2007 through which, the appellant herein had purchased five sites to an extent of 74.233 cents in S.F.No.574/1B1 of Kalapatti Village, Coimbatore and she has been put in possession for the same by her vendor.

8.From the counter affidavit filed by the respondents, it is seen that the respondents had filed the suit O.S.No.641 of 2008 for declaration and for permanent injunction against the appellant herein and three others and all of them were remained ex parte including the appellant herein. On 30.11.2009, an ex parte decree was passed against the appellant and defendants therein. Subsequently, the appellant herein had filed a petition under Section 5 of the Limitation Act to condone the delay of 906 days in filing the petition to set aside ex parte decree and the same was allowed on cost and further, she filed a petition under Order 9 Rule 13 of the Code of Civil Procedure which was also allowed.

9.It is also seen from the counter to I.A.No.179 of 2017, wherein the respondents had stated that after the suit was restored, the suit was listed for cross examination of P.W.1 on 11.02.2015 and the appellant had sought several adjournments and had filed I.A.No.759 of 2015 under Order 7 Rule 11 of the Code of Civil Procedure for rejecting the Plaint. After the pleadings are completed, the respondents/plaintiffs had filed their counter statement. After several adjournments, the matter was taken up for final

disposal and the same was dismissed on 16.03.2016 and the main suit was listed for cross examination of P.W.1 on 30.03.2016. From that date, the matter was adjourned on the request of the appellant herein stating that she had preferred a Civil Revision Petition against the said order of dismissal before this Court, but she has not produced any order from the Hon'ble High Court in their favour. On 25.10.2016, they were set ex parte and an order was passed on that date.

10.Further, it has been stated that on 07.08.2009, a raid was conducted by DVAC Officials and certain documents were seized by them in which the documents belonging to the sale transaction regarding the survey number was also seized and till date the appellant and her husband are trying to retrieve the documents. Due to that, the appellant fell sick and impaired for more than two years and till that time, she has not been served with any papers and unaware about the decree passed also. Without knowledge of the status of the case, the appellant could not appear for hearing on 30.11.2009 and that she came to know that due to her non appearance, an ex parte decree was passed. Immediately, she filed a petition to set aside the ex parte decree and also filed an application to condone the delay in filing the application to set aside the ex parte decree and those applications were allowed and ex parte order was set aside. Again on 25.10.2016, an ex parte decree was passed in O.S.No.641 of 2008 for her non appearance.

11.It is seen from the records that the appellant has filed a petition to condone the delay of 906 days in filing the application to set aside the ex parte decree and the said petition was allowed on cost of Rs.1,000/- and subsequently, she has filed a petition for the same provisions mentioned in the application for setting aside the ex parte and the same application was allowed and when the same was restored on 27.06.2013, no Written Statement was filed within the stipulated period and it has been filed only on 26.08.2013. Further, the court below has accepted the same and framed the issues. Again when the matter was posted for examination of the respondents/plaintiffs on 05.02.2015, the 2nd plaintiff/2nd respondent was examined as P.W.1 and thereafter, the case was adjourned to 06.03.2015 for cross examination of P.W.1. Without cross examining P.W.1, the appellant herein had filed a petition for rejection of Plaint. When the same was disposed of on 16.03.2016, the appellant herein ought to have cross examined the 2nd respondent/P.W.1. Instead of cross examining, the appellant has filed a Memo stating that a Civil Revision Petition would be preferred against the said order. The suit was adjourned for several times from 30.03.2016 to 09.09.2016 for production of order copies, but the appellant has not produced any order before the Court below. The appellant herein was directed to cross examine P.W.1. but she

did not choose to appear before the court below through pleader and tried to cross examine the 2nd respondent/2nd plaintiff. Since there was no appearance on the side of the appellant herein, notice was issued and inspite of receiving notice, she has not appeared to complete the cross examination and an ex parte order was passed on 25.10.2016 against the appellant. Again, the appellant has filed a petition to condone the delay of 189 days in presenting the application for setting aside the ex parte Decree once again, which was numbered as I.A.No.506 of 2017. It is further seen that the court below has allowed the said application filed for condoning the delay since the respondents/plaintiffs have not raised any serious objection. Even in the said application, the appellant has also admitted the same contentions which were stated in the earlier application that there was a raid conducted by the DVAC Officials and at that time, certain documents were seized and therefore, the appellant is not in a position for proceeding with the trial. When the matter was taken up for hearing, she has not produced any material to show that the documents were taken by the Authorities or no documents were produced along with the application for condonation of delay and further, she has not taken steps to retrieve the documents. Considering the same, the court below has dismissed the said petition.

12.It is also seen from the pleadings that the appellant herein was set ex parte in the year 2009 and she has filed a petition for setting aside the ex parte decree with the delay of 906 days, and also filed a petition under Order 9 which was also allowed. After restoration, the appellant has prolonged the proceedings and taken 18 months time from one pretext or other. The appellant had filed a petition for rejection of the Plaint to protract the proceedings. After filing of the Civil Revision Petition, the appellant has not produced any order passed by this Court to that effect and even after that, the court below has issued notice to the appellant and after getting notice, she has not appeared. Since the suit is of the year 2008, on 25.10.2016, the court below with no other remedy available and taking into consideration the intention of the appellant, which is was only to protract the proceedings and not to contest the same, had passed an ex parte order.

13.In view of the above, this Court has also found that the reasons stated in the appeal are unbelievable, because the appellant is the resident of Coimbatore stating that she could not contact the counsel to proceed further, that would show the appellant did not have any inclination to conclude the proceedings and it is only an imaginary reason, when there is no material produced before this Court to show that the reason is a bona fide one and she has taken steps to retrieve the documents. On earlier occasion, the appellant

has stated the same reasons, viz., that on 07.08.2009, the documents were taken by the DVAC officials and in the year 2015, and now also the appellant is telling the same story, which is not a valid reason to be taken as a bonafide one. It is also further seen that from the year 2009 to 2016, she cannot retrieve the documents, inspite of the efforts, is also an unbelievable one. There is no material adduced/produced to show that she has taken steps for retrieving the same and what happened to the said action taken by the DVAC officials. Hence, the appellant is prolonging the case in one way or other to deny opportunities to the persons who have filed the suit for declaration and for permanent injunction. Further, the appellant herein, who is the 3rd defendant in the Original Suit, has not shown any valid reason to set aside the ex parte decree passed by the Lower Court.

14.The learned counsel for the appellant in support of his contentions has relied on the Judgment of the Hon'ble Supreme Court, reported in 2011 (11) CTC 27 (G.P.Srivatasava v. Shri. R.K. Raizada and others), wherein in that case it is stated that the nephew of the counsel of the appellant had died in a road accident on the date of hearing and that the appellant himself was not at the station on account of his employment and illness. Both the Trial Court as also the High Court have adopted a very narrow and technical approach in dealing with a matter pertaining to the eviction of the appellant despite the fact that he had put a reasonable defence and had approached the Court for setting aside the ex parte decree, admittedly, within the statutory period. Even if the appellant was found to be negligent, the other side could have been compensated by costs." But here in this case, the ex parte decree was passed as early as on 30.11.2009 and later, on the delay of 906 days, was set aside and thereafter, the appellant has filed her Written Statement only on 26.08.2013 that too with a delay and for cross examination of P.W.1, the case was adjourned from 26.03.2015. However, without proceeding for cross examination, she has chosen to file an application, viz., I.A.No.759 of 2015 and the same was dismissed on 16.03.2016. Further, she has dragged on the matter one way or the other, for more than a decade. Hence, the Judgment relied on by the appellant is not applicable to the facts and circumstances of the case on hand because the reasons stated above clearly shows the lethargic attitude of the appellant and the reasons put forth by the appellant are not sufficient, valid and lacks bonafide.

15.Hence, this Court is of the view that the appellant is reiterating the same reason as stated earlier and accordingly, the order passed by the Lower Court needs no interference. Recording the reasons that sufficient cause has not been shown by the parties and that the ex parte decree can

be set side only if the reasons are satisfactorily given before the Court. Moreover, no other valid reason or sufficient cause has been shown by the appellant by which she was prevented from making appearance for suit hearing. Further, the reasons assigned are only in the nature of revealing that she had acted in a negligent manner, lacking diligence, remaining inactive and furnishing lame excuses.

16.The appellant/3rd defendant has not shown any bonafide reason that she was prevented from appearing for all the hearings in the suit, which was periodically adjourned from 30.03.2016 to 25.10.2016. Further, the appellant has also not furnished any valid or sufficient reason for remaining ex parte on two occasions. On going through the entire documents placed on record, it is seen that the absence of the appellant herein cannot be condoned as there is no valid and sufficient cause shown by her for her absence. Merely stating that the documents were seized by the officials of DVAC and the appellant is without any supporting documents, cannot be accepted by this Court and the same is hereby rejected.

Accordingly, this Civil Miscellaneous Appeal is dismissed. The order passed by the Lower Court in I.A.No.679 of 2017 in O.S.No.641 of 2008 dated 23.10.2017 is confirmed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mps

To

1.The Principal District Judge,
Coimbatore.

2.The Section Officer,
V.R. Section,
Madras High Court, Chennai.

C.M.A.No.3301 of 2019
and
C.M.P.No.19213 of 2019

SAI (CO)
CB(11/11/2020)