

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 01.09.2020	Delivered on 14.09.2020
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CRP. NPD.No.959 of 2018
and CMP No.5137 of 2018

1. Muthalammal

2. M.Sampathkumar

3. S.Aravindarajan

4. S.Yuvareka

5. Preetha

.. Petitioners

1. K.P.Natarajan

2. D.Thiyagu

.. Respondents

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PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, praying to set aside the order dated 28.11.2017 made in I.A.No.142 of 2017 in O.S.No.264 of 2013 on the file of the Additional District Judge/Fast Track Court No.4, Bhavani Erode District.

For Petitioners : Mr.Mr.T.Balaji
for M/s.A.Thiyagarajan

For Respondents : Mr. M.Guruprasad

ORDER

This matter is taken up for hearing through Video-Conferencing.

The defendants in OS No.264 of 2013 whose application to condone the delay of 862 days in filing an application to set aside the *exparte* decree passed in OS No.264 of 2013 on 08.04.2015 came to be dismissed, are on Revision.

2. The suit in OS No.264 of 2013 was filed for specific performance of an agreement of sale dated 25.04.2011. The plaintiffs claimed that the defendants had entered into an agreement for sale of the suit properties for a total consideration of Rs.26,40,000/- and had received of an advance of Rs.8,80,000/- on the date of the agreement. A period of six months was fixed for the performance of the contract. It is also claimed that the second defendant had received a sum of Rs.1,50,000/- on 15.09.2011. Claiming that the defendants did not come forward to receive the balance of sale consideration and execute the Sale Deed, despite demands, the plaintiffs had sought for specific performance.

3. The suit came to be decreed *exparte* on 08.04.2015. The plaintiffs filed

Execution Petition in EP No.33 of 2015 seeking execution of the decree. It is at this juncture, the defendants came up with the Application in IA No.142 of 2017 seeking condonation of delay. They had also filed their written statement along with the said application. According to the petitioners, they could not appear on 08.04.2015 as the first defendant, aged mother of the second defendant Sampathkumar, fell sick and she had to be rushed to the hospital.

4. It is also stated that when the application to set aside the *exparte* order made in the Execution Petition was being prepared again the mother of the deponent fell sick and she had to be rushed to the hospital, therefore the application to set aside the *exparte* decree could not be filed on the same day i.e., 16.11.2016. Since the health condition of the mother of the deponent viz., the second defendant continued to be bad, the second defendant could not meet the counsel and take steps to have the *exparte* decree set aside. It is also stated that the delay occurred only due to the aforesaid circumstances and the delay is neither willful nor wanton.

5. This application was resisted by the plaintiffs contending that the reasons for the delay are not true. It is also stated that the plaintiffs have deposited the balance of sale consideration also before the Court and therefore,

there is no justification for the delay on the part of the defendants. The plaintiffs/respondents would also contend that despite the Court having granted more than a year's time, the defendants did not chose to file their written statement and the defendants were served in the Execution Petition on 14.12.2015 despite such service, they did not chose to file an application to have the *exparte* decree set aside.

6. It is also stated that the plaintiffs had spent a sum of Rs.1,98,000/- in purchasing the stamp papers for obtaining the fair sale deed. It is also stated that the petitioners should have filed this petition only after depositing the expenses incurred by the plaintiffs, particularly, the sum of Rs.1,98,000/- in execution of the Sale Deed. The defendants also filed an application to re-open the Interlocutory Application to enable them to produce certain documents, viz. the Medical Records.

7. The learned Trial Judge, who heard the application, concluded that the reasons for the delay cannot be accepted. The learned Trial Judge also relied upon Order 8 Rule 7 of the Code of Civil Procedure, which provides that the written statement should be filed within 30 days from the date of service. On the

above conclusions, the learned Trial Judge dismissed the application. Aggrieved the petitioners/defendants have come up with this Civil Revision Petition.

8. I have heard Mr.T.Balaji, learned counsel appearing for M/s.A.Thiyagarajan, for the petitioners and Mr.M.Guruprasad, learned counsel appearing for the respondents.

9. Mr.T.Balaji, learned counsel appearing for the petitioners would submit that the learned Trial Judge erred in adopting a very strict approach in condonation of delay. He would submit that the suit being one for specific performance and the reasons assigned for the delay is ill health of the mother of the second petitioner, who was aged more than 70years even on the date of the suit, should have adopted a more humane approach in considering the explanation offered by the petitioners for the delay. He would also submit that the third petitioner was a minor on the date of the *exparte* decree and the Court ought not to have preceded *exparte* in the absence of the guardian. He would submit that the Court should have appointed a Court Guardian at least to protect the interest of the minor.

10. Contending contra, Mr.M.Guruprasad, learned counsel appearing for the respondents would submit that the petitioners were aware of the *exparte* decree they had entered appearance in the Execution Petition even in the year 2016. They however, did not chose to file an application for setting aside the *exparte* decree immediately upon service of the notice in the Execution Petition. They waited for more than a year and thereafter, have come up with this application to set aside the *exparte* decree. He would also point out that apart from depositing the balance of sale consideration, they have also spent huge amounts for execution of Sale deed.

11. I have considered the rival submissions.

12. Since there was some doubt about the appointment of a guardian for the minor petitioner, I had called for the records in the original suit regarding appointment of a guardian. A perusal of the records shows that an application in IA No.981 of 2013 was filed for appointing the second defendant as the guardian for the minor. Notice was served on the second defendant and the following order came to be passed on 23.03.2014.

“Batta served. Vakalat by guardian to minor

filed. Hence this petition is closed.”

This order shows that there was no appointment of a guardian for the minor as required under Order 32 Rule 3 of the Code of Civil Procedure.

13. Order 32 Rule 3 of the Code of Civil Procedure reads as follows:

3. Guardian for the suit to be appointed by Court for minor defendants.—

(1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian upon notice to the father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian of the minor, or, where there is no father, mother or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(4A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.

(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree.

A bare reading of the above Rule makes it clear that a duty is cast upon the Court to appoint a guardian for a minor defendant.

14. As already pointed out in the case on hand, it turns out that no guardian was appointed, the suit was proceeded with and an *ex parte* decree came to be passed. What is the effect of such *ex parte* decree is no longer as *res integra*. The judgment of the Hon'ble Supreme Court in ***Ram Chandra Arya v. Man Singh and another***, reported in ***AIR 1968 SC 954***, a three Judge Bench of the Hon'ble Supreme Court had an occasion to consider the effect of a decree passed against a minor without him being represented by a duly appointed guardian. The Hon'ble Supreme Court had held that the decree itself is a nullity and once the decree is held to be a nullity any proceeding pursuant to the decree is also a nullity. In doing so, the Hon'ble Supreme Court had observed as follows:

“It is now a well settled principle that if a decree is passed against a minor without appointment of a guardian the decree is a nullity and is void not merely voidable.”

However, there are some subsequent decisions of the Hon'ble Supreme Court

which take the view that a decree passed against a minor without appointment of a guardian can be set aside only on the ground of prejudice and such a decree cannot be set aside in the absence of prejudice to the minor defendant.

15. In this view is reiterated by the Hon'ble Supreme Court in ***Nagaiah and another v. Chowdamma (dead) by Legal Represetantives and another***, reported in ***(2018) 2 SCC 504***. Though the said case related to a suit filed by the minor through next friend a reference is made in the said decision to a judgment of this Court in ***Rangammal v. Minor Appasami and others***, reported in ***AIR 1973 Mad 12***, wherein it was held that where the minor's interest have been adequately safeguarded by the natural father by representing him in the suit mere absence of a formal order appointing the natural father as a *guardian-ad-litem* would not vitiate the decree against the minor. Therefore, there is a difference between cases where there is a procedural irregularity in the appointment of a guardian, but the guardian, however, appears for the minor and pleads for the minor and the cases where the guardian does not appear and remains *exparte*. Even the Hon'ble Supreme Court in ***Nagaiah***'s case had held that if prejudice is shown and if the interest of the minor is prejudiced then the decree passed without appointing a guardian will have to be set aside on the ground of prejudice

alone.

16. The suit on hand is one for specific performance and vast extent of property worth more than Rs.26,00,000/- is involved. A Perusal of the written statement filed along with this application shows that there are some valid defence pleas available to the defendants. In such a suit if an *exparte* decree is made that too without a guardian being appointed under Order 32 Rule 3 of the Code of Civil Procedure, I am of the considered opinion that, it will definitely prejudice the interest of the minor. No further evidence of prejudice is required. The question of delay and the fact that the minor attained majority in the interregnum would take the back seat, when the prejudice that had occurred to the petitioners particularly, the third defendant was a minor at the time of the decree is considered. It will also be of interest to note that Order 32 Rule 11 empowers the Court to remove the guardian if he does not do his duty.

17. The question of removal would arise, if the guardian is found guilty of non-performance of his duties. A guardian who remains *exparte* is definitely guilty of non-performance of his duties. The Court should have at least appointed a Court Guardian to protect the interest of the minor. The absence of resort to

such procedure also strengthens the fact that the interest of the erstwhile minor will be prejudiced if the *exparte* decree is sustained. I am therefore, of the considered opinion that the *exparte* decree is bound to be set aside since there is no valid order for appointing a guardian and the action of the guardian remaining *exparte* has prejudiced the interest of the minor.

18. Coming to the reasons assigned for the delay, it is stated that it is the illness of the mother/the first petitioner which is occasion the delay. Of course there is no medical evidence that has been produced, the attempt to produce some medical records failed, since the Trial Court refused to allow the said application.

19. Now that I have concluded that the decree is liable to be set aside on the ground of prejudice alone, I do not think I should go into the question of delay and the availability or non availability of sufficient cause for such condonation of delay. The Civil Revision Petition is therefore **allowed**. Since I have found that the *exparte* decree itself, if allowed to stand in occasion prejudice to the interest of erstwhile minor, I exercise my powers under Article 227 of the Constitution of India and set aside the *exparte* decree. Consequently,

the connected miscellaneous petition is closed.

20. The written statement filed already is taken on record, the Trial Court is directed to proceed with the suit by framing necessary issues and dispose it of in accordance with law. The Trial Court is further directed to give priority to the suit, since the suit itself is in the year 2013.

21. Having said so, the plaintiffs who had expended monies in prosecuting the litigation and also getting the Sale Deed engrossed on stamp paper for value of Rs.1,98,000/- have to be compensated for the delay. I therefore, direct the petitioners to pay a sum of Rs.2,50,000/- as cost, to the respondents/plaintiffs on or before 16.10.2020, failing which the Civil Revision Petition will stand dismissed.

सत्यमेव जयते

14.09.2020

jv

Index: Yes
Internet: Yes
speaking order

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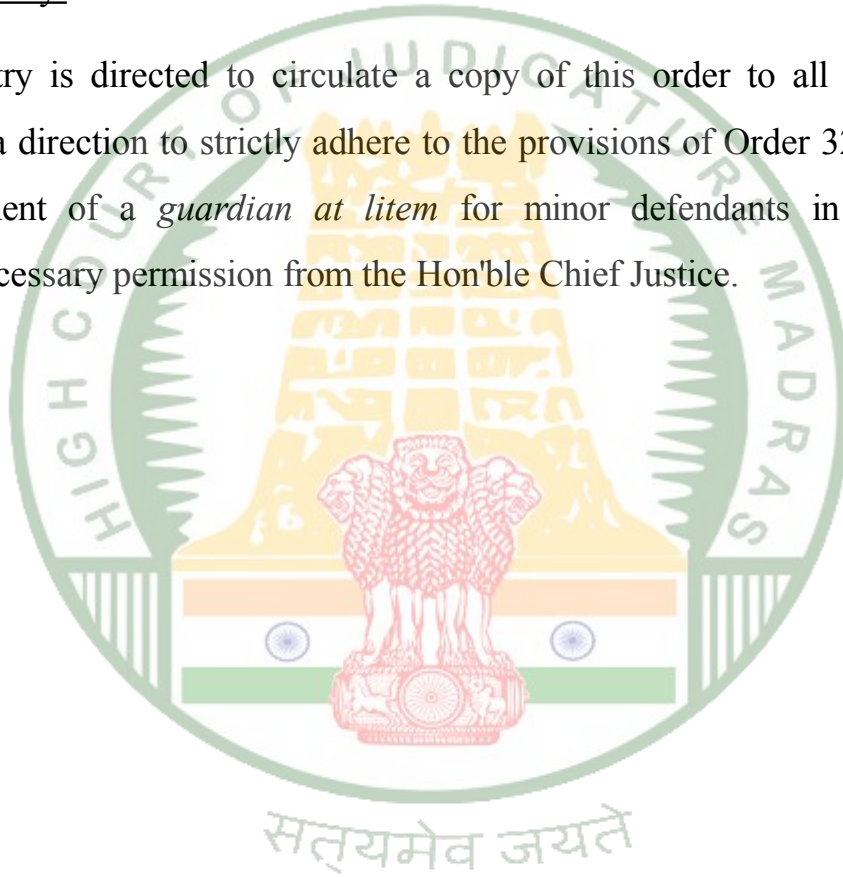
To

1. The Additional District Judge/Fast Track Court No.4,
Bhavani Erode District.
2. The Section Officer, V.R.Section, High Court of Madras.

Note to Registry:

Registry is directed to circulate a copy of this order to all subordinate courts with a direction to strictly adhere to the provisions of Order 32 in matters of appointment of a *guardian at litem* for minor defendants in suits after obtaining necessary permission from the Hon'ble Chief Justice.

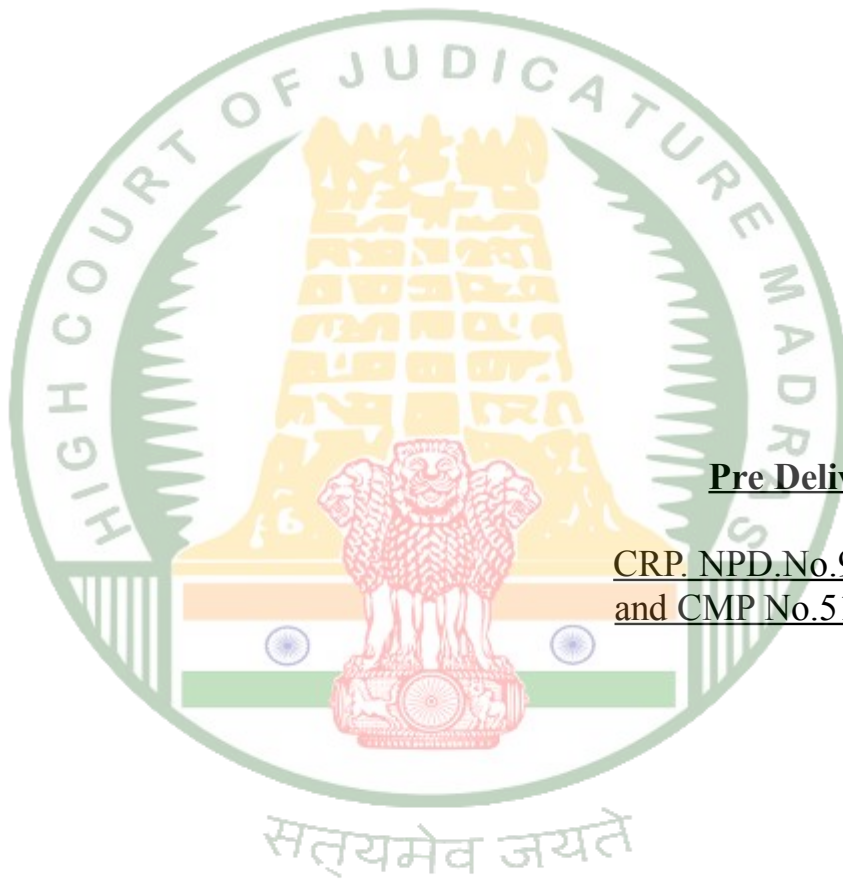
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R.SUBRAMANIAN, J.
jv



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