



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.03.2020

CORAM:

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

CRP NPD (MD) No. 440 of 2020
and
CMP (MD) No. 2614 of 2020

Justin Suthakar

... Petitioner/ Petitioner/
2nd Defendant

Vs.

1.S.S.Litta Premavathy

... 1st Respondent/1st Respondent/
Plaintiff

2.Arputha Jeeva Baby

... 2nd Respondent/2nd Respondent/
1st Defendant

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the Docket order dated 26.02.2020 passed in unnumbered I.A.No. -- of 2020 in O.S.No.154 of 2015 on the file of the learned Additional District Munsif Court, Padmanabhapuram, Kanyakumari District by allowing this Revision Petition.

For Petitioner : Mr.P.Krihsnasamy

For Respondents : Mr.C.K.M.Appaji

ORDER

The first respondent/plaintiff filed a suit in O.S.No.154 of 2015 on the file of the Additional District Munsif Court, Padmanabhapuram. The suit was decreed. In order to execute the decree, she filed E.P.No.20 of 2016 before the Executing Court and the same is pending and for taking delivery of the property, she has also sought for police protection and that was ordered. At this stage, the petitioner filed a petition to condone the delay of 942 days in filing a petition to set aside the *ex parte* decree passed against him on 29.07.2016. The said petition was returned by the Court, making the endorsement as follows:



"The present petition is filed under Order 9 Rule 13 to set aside the ex parte decree passed against the present petitioner on 29.07.2017. To set aside the ex parte decree I.A.No.547 of 2017 was filed, in that, conditional order was passed by this Hon'ble Court against the present petitioners. The condition by this Hon'ble Court has not been complied with and hence I.A.No.547/2017 has been dismissed for non compliance of the condition in I.A.No.547/2017. The petitioner herein states that the plaintiff in the suit has filed Execution Petition No.20/2016 after the dismissal of I.A.No.547/2017 and delivery of plaint schedule property has been ordered. The petitioner states that when senior bailiff came for executing the delivery order the petitioners have come to know about the ex parte decree passed against them. Hence the present petition is filed to set aside the ex parte decree along with Section 5 petition to condone the delay of 942 days.

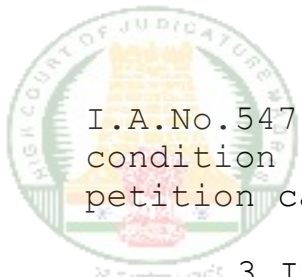
Already I.A.No.542/2017 has been filed to set aside ex parte decree passed on 29.07.2017. The above said I.A. has been dismissed for non compliance of the condition passed by this Hon'ble Court. Hence a fresh interlocutory petition to set aside the ex parte decree is not maintainable to camouflage and cure the non compliance in I.A.No.547/2017.

Further the non compliance of earlier I.A.order cannot be streamlined through this present fresh application.

Since the present petition is not maintainable, the other I.A.file under Order 21 Rule 6 to stay the execution, Section 5 application to condone the delay of 942 days to set aside ex parte decree is also returned along with application under Order 9 Rule 13."

Challenging the said return endorsement made by the trial Court, the petitioner is before this Court by way of filing this Civil Revision Petition.

2.The learned counsel for the petitioner would submit that though the petitioner remained ex parte, now only he came to know about the ex parte decree passed against him. Even during pendency of the suit, the first defendant has filed a petition in I.A.No.547 of 2017 to set aside the ex parte decree and that was allowed on condition and since the first defendant did not comply with the conditional order, that petition was dismissed and now, the petitioner/2nd defendant, for the first time filed the petition to condone the delay in filing the application to set aside the ex parte decree and that petition was returned stating that earlier



I.A.No.547 of 2017 filed by the first defendant was allowed on condition and that was not complied with and therefore, another petition cannot be filed on the very same ground.

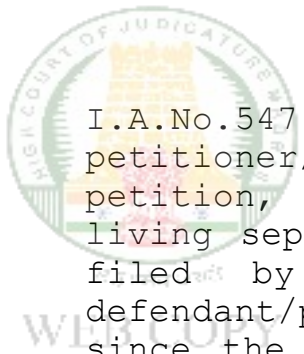
3. It is the contention of the petitioner that he was not a party or the petitioner in the said I.A.No.547 of 2017 and the said petition was also dismissed for non compliance of the conditional order passed therein. Therefore, the reason for returning the petition filed by the petitioner/first defendant is not sustainable. The trial Court without application of mind, taking into account the order passed by the trial Court in the earlier application filed by the first defendant in I.A.No.547 of 2017, returned the application, which is unwarranted.

4. The learned counsel for the respondents would submit that though summon was served to the second defendant in the suit and he has also engaged a counsel, he remained *ex parte*. Thereafter, the first respondent/plaintiff filed an execution petition. Since the petitioner/2nd defendant and first defendant did not participate in the execution proceedings, the Execution Court allowed the Execution Petition and delivery was ordered and to get delivery of the plaint schedule property, the plaintiff sought for police protection and that was ordered. Now, in order to protract the proceedings and also to restrain the plaintiff from taking delivery of the property, the petitioner/2nd defendant filed the application and the reasons stated therein are not acceptable and therefore, this Civil Revision Petition is liable to be dismissed.

5. Heard the learned counsel on either side and perused the entire materials available on record.

6. Admittedly, the first respondent/plaintiff filed a suit in O.S.No.154 of 2015. In the said suit *ex parte* decree was passed on 29.07.2016. Subsequently, Execution Petition was filed and the same is pending. At this stage, the petitioner had filed an application under Section 5 of the Limitation Act to condone the delay of 942 days in filing a petition to set aside the *ex parte* decree and that application was returned by the trial Court stating that earlier the application filed by the first defendant in I.A.No.547 of 2017 was allowed on condition. Since the condition imposed therein was not complied with, that petition was dismissed and therefore, the present application filed by the petitioner/2nd defendant is returned.

7. Considering the submissions made by the learned counsel for the petitioner and a perusal of the records would show that the petition in I.A.No.547 of 2017 was filed only by the first defendant and though the learned counsel for the respondents would submit that the first defendant who filed the application in



I.A.No.547 of 2017 is none other than the mother of the petitioner/second defendant and there is no merit in this petition, the petitioner has stated that he and his mother are living separately and therefore, he is not aware of the petition filed by the 1st defendant. Even though both the 1st defendant/petitioner and 2nd defendant are the mother and son, since the petitioner is not a party to I.A.No.547 of 2017, the trial Court should have numbered the application filed by the petitioner and should have decided the same on merits and in accordance with law. Instead of taking the application filed by the petitioner on file, the trial Court has simply returned the application stating the reason that the earlier application filed by the first defendant was dismissed for non compliance of the conditional order and therefore, the present petition is returned.

8.A perusal of the affidavit filed by the first defendant in I.A.No.547 of 2017 would show that it was filed only by the first defendant and not by this petitioner. Therefore, the reason stated in the return is not correct. Under these circumstances, the return order passed by the trial Court is liable to be set aside and accordingly it is set aside. The trial Court is directed to number the application filed by the petitioner to condone the delay of 942 days in filing a petition to set aside the *ex parte* decree and after giving opportunity to the respondents, dispose of the application on merits. Since the earlier application filed by the first defendant to condone the delay in filing a petition to set aside the *ex parte* decree was dismissed, the second defendant, who is none other than the son of the first defendant cannot say that he is not aware of the execution proceedings. Therefore, the Executing Court is directed to proceed with the Execution Petition without awaiting the order in the petition filed by the petitioner/2nd defendant to condone the delay of 942 days in filing a petition to set aside the *ex parte* order.

9.With the above observations, this Civil Revision Petition is disposed of. No costs. Consequently, CMP(MD)No.2614 of 2020 is closed.

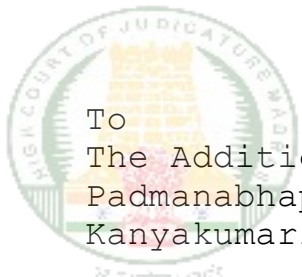
Sd/-

Assistant Registrar(CS)

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/ /2020

Sub Assistant Registrar(CS)



To
The Additional District Munsif Court,
Padmanabhapuram,
Kanyakumari District.

+1 CC to M/s.C.K.M.APPAJI, Advocate(SR-11761[F] dated 16/03/2020)

+1 CC to M/s.P.KRISHNASAMY, Advocate(SR-11823[F] dated 16/03/2020)

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SPU(07.05.2020) 5P 4C