

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 6TH DAY OF AUGUST 2021

THE MASTER

A. No.6438 of 2013

in

C.S. No.534 of 2012

C.S. No.534 of 2012:-

Ravikumar M. Doss (H.U.F.),
represented by their Karta, Ravikumar M.Doss,
No.56/129, Adam Shahib Street,
Royapuram, Chennai-600 013. ... Plaintiff

-Versus-

Sivasri Madhavan,
Adyar Annora, Flat No.B-7, 4th Floor,
Door No.68, Plot No.345, 4th Main Road,
Gandhi Nagar, Adyar, Chennai-600 020. ... Defendant

A. No.6438 of 2013:-

Sivasri Madhavan,
Adyar Annora, Flat No.B-7, 4th Floor,
Door No.68, Plot No.345, 4th Main Road,
Gandhi Nagar, Adyar, Chennai-600 020. ... Applicant/Defendant

-Versus-

Ravikumar M. Doss (H.U.F.),
rep. by their Karta, Ravikumar M.Doss,
No.56/129, Adam Shahib Street,
Royapuram, Chennai-600 013. ... Respondent/Plaintiff

A. No.6438 of 2013:-

Application praying that this Hon'ble Court be pleased to set aside the exparte decree passed in the above suit on 19.11.2013.

This Application coming on this day before this court for hearing, the court made the following order:-

This application is filed to set aside the exparte order passed against this petitioner/defendant on 19.11.2013.

2. The applicant is the defendant in the suit and the respondent is the plaintiff.

The plaintiff/respondent filed this suit against the applicant/defendant for recovery of money of sum of Rs.30,60,000/- and for further interest of Rs.12,97,880/- and for further interest at the rate of 24 % p.a. for Rs.30,60,000/- from the date of the plaint till the date of realization. The suit was filed as a summary suit. Since this applicant/defendant did not file application for leave to defend within 10 days of receipt of summons for Judgment, he was set exparte and exparte decree was passed on 19.11.2013. Now this applicant/defendant has come forward with this application to set aside the exparte decree passed on 19.11.2013.

3. The learned counsel for the applicant/defendant submitted that the Applicant/defendant was not duly served with summons in this case. He used to go out of station most of the days due to his business tours. On 22.04.2013, he came to know that a court notice was affixed in his door and he immediately contacted his previous counsel and entrusted him to proceed in the matter. His counsel told that he was set exparte on 27.03.2013 and his counsel filed application to set aside the exparte order on 23.04.2013. Thereafter, the applicant/defendant regularly contacted his counsel till the month of August 2013, Thereafter there was no progress in the suit. The applicant contacted the present counsel and obtained change of vakalath from his previous counsel and engaged the present counsel on 22.11.2013. When the present counsel filed vakalath and search memo, the applicant came to know that the suit has been decreed on 19.11.2013. As per the provisions of order XXXVII Rule 3 of Civil Procedure Code, the Applicant ought to have filed an application for leave to defend within 10 days from the date of service of summons for Judgment. The previous counsel of the applicant omitted to follow the procedures. The applicant was not properly advised by the previous counsel to apply for leave to defend. Since leave to defend was not filed, a decree was passed against applicant on 19.11.2013. Now, the applicant has filed the application for leave to defend. Hence this

application is filed to set aside the ex parte decree passed against this petitioner on 19.11.2013.

4. The learned counsel appeared for the respondent/plaintiff submitted that all the averments stated in the affidavit of the application is denied. The application filed by the applicant is not maintainable either in law or in facts and to be dismissed in limine. The suit is filed under summary procedure. The respondent/plaintiff counsel caused a legal notice to the applicant/defendant to make payment for the cheques and the said notice was returned by the applicant with several postal remarks such as “Door locked intimation delivered”, “intimated”, “left” and “insufficient address”, “not known”. The applicant had wantonly and willfully chosen to evade receipt of the legal notice. When the bailiff went to the address of the applicant to serve the summons he returned the same with remarks as “Door locked”. Again private notice issued to the said address which was returned postal remarks “Door locked”, “intimation delivered”, “unclaimed”. This Hon'ble Court on 26.02.2013 ordered for substituted service by paper publication and paper publication was effected. For all the notices issued, the applicant chosen to remain quite knowing fully well consequences thereof. The applicant was well aware of all the entire court

proceedings and all of a sudden, on 23.04.2013, he filed the vakalath for entered appearance. Later, the Applicant counsel served a memo of appearance to the respondent counsel belatedly on 19.07.2013. On 24.07.2013, the applicant counsel was served with the copies of summons of judgment with supporting affidavit, plaint and the plaint documents. The applicant had to file application seeking for leave to defend within 10 days from the service of summons for judgment, but the applicant failed to do so. On 11.11.2013, there was no representation on the applicant side and the respondent was examined and marked Ex.A1 to Ex.A9. Again on 19.11.2013 there was no representation on the applicant side. Hence the court heard the representation of the respondent/plaintiff and the suit was decreed in favour of the respondent/plaintiff. The applicant failed to comply with the stipulations of law. After the suit has been finally decreed against the applicant, she came with this application which is devoid of any merits. Hence it is to be dismissed.

5. This court gave its anxious consideration to rival submissions.

6. Now the point for determination is whether this petition is to be allowed and the exparte order passed on 19.11.2013 has to be set aside?

7. Admittedly the applicant/defendant was set exparte and decree was passed against him on 19.11.2013. The background story of passing exparte decree against this applicant/defendant is stated by the applicant/defendant in his affidavit. Before analyzing the merits of the application, at this juncture it is relevant to point out the provisions relating to suits which can be tried in summary nature.

Order XXXVII Rule 3 (1 to 5)

Procedure for the appearance of defendant

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in court an address for service of notice on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No.4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be

deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or judge to be just;

The applicant has stated that he was not duly served with summons, hence he was set exparte on 27.03.2013. He found notice affixed in his door on 22.04.2013. After setting exparte only he entered into appearance through his previous counsel on 23.04.2013. After entered into appearance through his previous counsel only he came to know that he was already set exparte. Further he stated that he filed petition to set aside the exparte order through his previous counsel. The first time when the applicant/defendant was set exparte was without proper service of summons, as stated by the applicant.

After entering into appearance through his previous counsel he was served with summons for Judgment. The same is admitted by the applicant/defendant. As per Order XXXVII Rule 3(5) leave to defend has to be filed within 10 days. But the applicant failed to do so. The reason stated by the applicant is that he was not aware of the procedure. The applicant has appeared through his previous counsel, a learned advocate. He was aware of the fact that already an exparte order was passed against him. The reason stated by the applicant that he was not aware of procedure or law that he should file leave petition within 10 days is not acceptable. Since there was

an order of exparte, he might have thought to file leave to defend application after setting aside order of exparte. Though ignorance of law is not excusable, because of the negligence on the part of the counsel, the innocent client should not be suffered and he must be given an opportunity. The failure to file leave to defend application within time might have been the mistake on the part of his previous counsel.

The applicant in his affidavit stated that he regularly contacted his previous counsel and since there was no progress in the suit, he contacted the present counsel. When the present counsel after filing vakalath and searched for records, he came to know that suit was decreed on 19.11.2013. The respondent/plaintiff in his counter affidavit has specifically stated that on 12.11.2013 the case was posted and evidence was taken. On that day there was no representation on applicant/defendant side. Further the respondent has stated that on 19.11.2013, when arguments was heard, on that day also there was no representation on the applicant/defendant side. This averment was not denied by the applicant. It is always the bounden duty of the litigant to follow the proceedings when the suit is pending. The applicant/defendant was well aware of the pending of the suit and had the knowledge that he was already set exparte. The negligence on the part of him to follow the proceedings and non appearance of him on hearing dates is not acceptable.

The applicant has stated another reason that there was no progress in the suit and after engaging the present counsel only, he came to know that suit was decreed on 19.11.2013. Further he stated that he immediately filed application to set aside the ex parte decree. But in that application he has not pleaded his defence. It is settled law that Order 9 Rule 13 of CPC is different from Order 37 Rule 4 of CPC and while filing the application Order 37 Rule 4, the defence has to be pleaded and leave to defend also to be prayed. The learned counsel appeared for the respondent submitted a citation reported in AIR 2003 SC page 1322 in which it is stated that

“AIR 2003 SUPREME COURT

1322

(From: Delhi)

S.S.M.QUADRI AND ASHOK BHAN, JJ.

Civil Appeal No.2538 of 2003 (arising out of SLP (C) No.22588 of 2001), D/-28 -3 -2003.

Rajni Kumar, Appellant v. Suresh Kumar Malhotra and another, Respondents.

(A) Civil P.C. (5 of 1908), O.37, R.4, O.9, R.13 – Ex parte decree in summary suit – Setting aside - Application by defendant – R.4 of O.37 is different from R.13 of O.9 – Under O. 37, R.4 defendant has to show not only special circumstances which prevented him from appearing or applying for leave to defend but also the facts which would entitle him leave to defend – Failure of defendant to disclose facts which would entitle him to defend case – Rejection of application – No interference”.

And argued that the applicant has failed to plead his defence in set aside application. Hence this petition is not maintainable. But this court is not going to look

into that aspect. The applicant preferred A.No.9144/19 in which Hon'ble Judge has dealt with this issue and directed to deal with leave to defend application in later and directed to deal with this petition to set aside exparte order only.

The applicant has stated that his previous counsel failed to follow proceedings of summary suit, so that he could not file leave to defend application. After setting exparte he engaged the present counsel and was very well aware of summary procedure. But he failed to plead his defence in his application filed to set aside the exparte order.

After filing of counter by this respondent/plaintiff, the applicant filed another application in A.No.6201/14 to permit him to file better affidavit. The same was dismissed. This order was passed on 11.03.2015. Against this order of dismissal this applicant has filed A.No.9144/19 to set aside order passed in A.No.6438/13. A.No.9144/19 was disposed with direction to dispose this A.No.6438/13 that is the set aside application filed by this applicant without any influence of that order.

It is pertinent to note that A.No.6201/14, the petition filed to receive better affidavit was dismissed by this court on 11.03.2015. Against this order, this applicant has filed A.No.9144/19. This application has been presented nearly after 8 months of order of dismissal of A.No.6201/14. The applicant in his affidavit has

stated the reason as settlement was going on. At this juncture, the applicant was very much, fully and thoroughly very well aware of summary procedure. But he passed 8 months of time without taking any steps. This application was represented with delay condone application, to condone delay of 238 days in A.No.3209/16. This was allowed on conditional order to deposit Rs.10,00,000/-.

In that order passed in A.No.3209/16 it has been observed by Hon'ble Judge that at every stage there is lack of urgency on the part of the applicant. The observation made by Hon'ble Judge is an evidence for the conduct of this applicant. The same was disposed in the year 2016 and the application to set aside order in A.No.6201/14 is numbered in the year 2019 as 9144/19. From the beginning itself, through entire proceedings, this applicant has without contesting the suit, purposely dragged the suit. This is a summary suit successfully dragged by this applicant/defendant from 2012 to 2021 for 9 years. The plaintiff/respondent/deeree holder even after obtaining decree in the year 2013 is prohibited by not enjoying the fruits of decree for the past 8 years because of the act of this applicant. This applicant from the beginning through all the proceedings in this case, has dragged the matter and prohibited the Decree Holder not to enjoy the results of the decree.

From the beginning itself, this applicant has been quite and dormant

knowing well the proceedings of this suit and dragged this proceedings according to him whims and fancies. This court do not find any merit on the part of this applicant as well as in this application. The application is devoid of merits. Therefore, this application is dismissed.

Sd./-MASTER

06/08/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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EVK 17/12/2021