

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.02.2021

CORAM :

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

C.R.P.(NPD)No.1940 of 2018
and
Cmp.No.11221 of 2018

Aravind Engineering Industries,
Rep.by its Partner,
Mrs.R.N.Meera,
Officer at No.20, SBI Officer Colony,
Arumbakkam, Chennai – 600 106.

... Petitioner

Versus

Mr.B.Subramanaian

... Respondent

Civil Revision Petition filed under Section 115 of Civil Procedure Code, to set aside the fair and decretal order passed in I.A.No.16987 of 2017 in O.S.No.10839 of 2010 on the file of the learned VII-Additional City Civil Judge, Chennai on 23.03.2018.

For Petitioner : Mr. K.M. Venugopal

For Respondent : Mr. P.V. Elango

ORDER

This Civil Revision Petition has been filed challenging the order dated 23.03.2018 passed in I.A.No.16987 of 2017 in O.S.No.10839 of 2010, filed under Section 5 of the Limitation Act, for condoning the delay of 2015 days in filing the petition for setting aside the exparte order, dated 06.08.2012 passed by the Court below.

2.It is the contention of the revision petitioner that the Court below condoned the delay of 2015 days without any valid reasons and the respondent herein has not provided sufficient reasons or explained reason for each and every day delay. The respondent entered appearance in the suit and filed a petition for vacate injunction. Therefore, the respondent herein is well aware of the fact of institution of the suit filed for specific performance by the plaintiff. When such being the case, after the exparte decree, an Execution Petition was filed, in which also the respondent was set exparte. In the execution proceedings, summons were served and the respondent herein received the same. Even on receipt of summon, he failed to appear, therefore, the respondent was set exparte on 03.10.2016 in the Execution Petition. Subsequently, the respondent filed the above said

application to condone the delay of 2015 days, to set aside the exparte decree, in the year 2017. He has also filed a petition to set aside the exparte decree in the Execution Petition. The exparte order was passed on merits while so, an application to set aside the exparte order with a petition for condoning the delay is not maintainable and only an appeal will lie. The Court below has not considered all these facts and condoned the inordinate delay of 2015 days in filing the application to set aside the exparte decree. Even though the suit was filed for specific performance, the delay is required to be explained for each and every day and in the absence of the same, the Court below ought not to have condoned it. Therefore, the order passed by the Court below is liable to be set aside and the Civil Revision Petition has to be allowed.

3. On the other hand, the learned counsel for the respondent submitted that he engaged a counsel in the main suit in O.S.No.10839 of 2010, he also filed an application to vacate injunction. However, thereafter, the counsel has not communicated anything about the development in the case and he was kept in dark about the pendency of the case. When summons were served in the Execution Petition, he came to know about the exparte order passed in the suit. Therefore, he filed an application for

condoning the delay on 2015 days in the month of December 2016 and the same was genuine. All these facts were elaborately considered by the Court below. He further stated that the suit was filed for specific performance, larger interest of the respondent needs to be adjudicated by way of contest and if the delay is not condoned the respondent could not adjudicate the same. The right of the respondent cannot be decided merely on the basis of the exparte decree passed by the court below. Therefore, he prayed to dismiss the Civil Revision Petition and to permit the respondent to contest the suit as per the law.

4.Heard the learned counsel for the petitioner and the learned counsel appearing for the respondent and perused the materials available on record.

5.The revision petitioner as well as the respondent entered into the sale agreement dated 18.12.2006 with reference to a property measuring 1200 sq. ft., for a sum of Rs.21 lakhs. It appears that plaintiff paid Rs.7 Lakhs as advance. However, the respondent herein says only for a sum of Rs.6 Lakhs, the document was signed. The time limit fixed in the agreement for execution of the sale deed, was three months. On

21.11.2007, a telegram was sent to the defendant by the plaintiff. On 26.11.2007, another telegram was sent and thereafter, he had issued a legal notice on 08.04.2018 demanding the plaintiff to pay the balance amount to execute the sale deed. But within the time mentioned in the Sale agreement, the entire amount was not paid by the revision petitioner and the Sale deed has not been executed. It is stated that after 11 months, the plaintiff sent a telegram by stating that he is ready and willing to get the sale deed executed by the defendant. At the time of filing the suit during June 2009, the plaintiff also not deposited any amount. Therefore, the issue of readiness and willingness is necessarily required to be adjudicated by the Court below.

6.However in the present case, unfortunately, the suit was decreed ex parte due to the non-appearance of the counsel for the respondent herein. The reason stated by the respondent was that he has engaged one counsel and he has not communicated anything about the disposal of the case all along. That is the reason why, he has engaged a different counsel to appear in this matter. All these aspects have been clearly dealt with by the Court below, in an elaborate manner and it would be appropriate to extract the relevant portion of the order of the Court

below as follows:

“10.Both sides heard. Records perused. On perusal of records it is seen that the above suit 10839 of 2010 was filed by the plaintiff for the relief of specific performance even in the year 2010 itself and after the service stage and after filing the vakalat on behalf of the defendants, he was set exparte for not filing the written statement even on 24.02.2011 itself. After that, the case was pending for exparte evidence till 2012 and ultimately exparte evidence was taken on 30.07.2012 and order was passed on 06.08.2012 by passing a decree in favour of the plaintiff for specific performance and also further granting two months time to deposit the balance sale consideration and further one month time was given from the date of deposit for the execution of sale deed. After approximately 4 years and 4 months, now this application is filed to condone delay of 2015 days in filing the Order IX Rule 13 petition. It is needless to say that in case of filing Section 5 application, it is bounden duty of the petitioner to explain each and every day's delay with a convincing explanation to the satisfaction of the Court. The main reason assigned by the petitioner for causing such a long delay is the advocate, who was engaged by the defendant did not inform the things transpired in the court and the petitioner was but in dark and he was not

at all intimated about the developments reached in the Court. Further, it is stated that the petitioner is a semi literate person only and he had become the absolute owner of the property by virtue of release deed executed by his sisters and brothers and mother in his favour and further it is contended that for the mediation work did by him the plaintiff used to give him money. In course of the transaction he become indebted to the plaintiff to the tune of Rs.6,00,000/- for which, he was compelled by the plaintiff to put his signatre in the sale agreement and it is the contention of the petitioner/plaintiff that right from the date of execution of the agreement he expressed his intention clearly to the respondent/plaintiff that he never intended to sell the property to the respondent/plaintiff and further, he is willing to repay the amount and whenever he tried to contact the respondent/plaintiff he could not contact him and then only a suit was instituted by the respondent/plaintiff for which he engaged counsel but the counsel engaged did the thing on his wishes and did things against him without informing about the developments on the events which transpired in the court. Ultimately, he was not been informed about the setting him of exparte and passing of exparte decree in favour of the respondent/plaintiff and because of non-cooperative attitude and going against his interest he

had to engage two more advocats for his case and lastly he engaged the present counsel who informed that he had to conduct the case by filing petition to set aside exparte decre since they are having a good defence in the case. In the meanwhile he received the summons in the execution proceedings and appeared before the lok adalat and in that lok adalat proceeding only he wa informed that the exparte decree has to be set aside to get a frutiful results. Unless otherwise exparte decree is set aside he will not be able to put forth his evidence. Under these circumstances it was felt by him that application is to be filed to condone the delay and to set aside the exparte decree. After the lok adalat proceedings as he had to face his childrens' exam and make arrangements for their higher studies and also in the meanwhile his mother-in-law got suffered healthwise he had to look after all the things. So he was not able to concentrate in filing of Section 5 application and to give insturction to his counsel. So all these resulted in the delay of 2015 days in preferring Section 5 application.

11.On the side of the respondent/plaintiff title of the petitioner/defedant is not denied. The main objection raised by them is that since it is an contested decree and judgment the petitioner ought to have

preferrd appeal only. But on perusal of records it is seen that the petitioner/defendant was set exparte for not having filed written statement within the mandatory period and only on taking exparte evidence the court has passed a decree in favour of the petitioner/defendant for specific performance. Hence, the contention of the respondent only recourse available to the petitioner/defendant is to prefer an appeal and not to file Order IX Rule 9 petition is not correct. Hence on that ground the objection taken by the respondent/plaintiff is not sustainable.

12.The other objection raised by the respondent/plaintiff is the number of days of delay is wrong and but on perusal of records it is seen that the petitioner/defendant was directed to file petition stating the delay as 2015 days. So on that ground also the objection raised is not acceptable and the oher objection raised by the respoondent is that purposely just to prolong the proceedings, the petitioner had filed the petition stating that he was victimized by his own counsel. It is a well beaten proposition of law that for the errors and wrongs committed by the counsel the client should not be victimized. Further on the side of the petitioner/defendant it is objected that without filing the written statement the petition filed by the

petitioner/defendant is not maintainable. But perusal of records shows written statement is filed along with petition in time.

13.Considering the fact that there is a triable issue raised in the suit and in view of the contention raised by the petitioner/defendant that he was compelled to put his signature in the agreement while paying loan amount by the respondent/plaintiff and also taking into consideration of his position that he is a semi literate person only and not known to the legal consequences of not prosecuting the suit etc., it is decided the petition should not be dismissed on the mere fact of inordinate delay. But to compensate inordinate delay caused by the petitioner/defendant and also for the inconvenience and hardships caused to the respondent/plaintiff it is decided to allow the petition on some cost will be a justifiable one. Under the above circumstances it is decided to allow the petition on cost and with further condition that the petitioner should be ready to conduct the trial immediately on framing of issues without further delay. The point is answered accordingly.

In the result, the petition is allowed on payment of cost of Rs.10,000/- to be paid by the petitioner/defendant to respondent/plaintiff on or before

2.4.2018 failing which the petition shall stand dismissed. Call on 3.4.2018.”

7.On perusal of the order would show that the learned Judge of the Trial Court has elaborately dealt with all these aspects and thereafter come to the conclusion that due to the fault on the part of the Lawyer engaged by the respondent, the exparte order came to be passed.

8.The suit was filed for specific performance, where, the larger interest in the suit property needs to be decided in the suit by way of contest, but the suit was dismissed for default. The rights of the parties in the property cannot be decided by way of passing the exparte decree. Obvisiously, in the present case, the default was on the part of the counsel, who appeared for the respondent. Due to the fault of the Lawyer, the Court ought not to have decided the dispute by way of passing the exparte decree, when, the larger interest in the properties is involved. The order under challenge is an elobrate order and dealt with all these aspects. Thus, I do not find any fault in the order of the Court below, in such view of the matter, I propose to dismiss the Civil Revision Petition as there is no substance in the submissions made by the learned counsel appeared on

behalf of the petitioner. Hence, the Civil Revision Petition deserves for dismissal.

9.Accordingly, the Civil Revision Petition is dismissed, by confirming the order dated 23.03.2018 passed in I.A.No.16987 of 2017 in O.S.No.10839 of 2010 on the file of the learned VII-Additional City Civil Judge, Chennai. No costs. Consequently, the connected miscellaneous petition is closed.

19.02.2021

Index: Yes/No
Internet: Yes/No
Speaking Order/Non Speaking Order

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To

The VII-Additional City Civil Judge, Chennai.

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KRISHNAN RAMASAMY, J.

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