

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 16.03.2021

Delivered on: 26.03.2021

CORAM:

THE HONOURABLE Mr. JUSTICE G.K. ILANTHIRAIYAN

C.R.P.(NPD).No.3994 of 2016

and

C.M.P.No.20197 of 2016

Prabu
S/o.Arumugam

... Petitioner

-Vs-

1.Ramaiya
S/o.Raman

2.Varadharajan
S/o.Raman

3.Jayaprakash Narayanan
S/o.Raman

4.Logiya
S/o.Raman

5.Kuppusamy
S/o.Nallamuthu

... Respondents

Prayer : Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decreetal order dated 03.11.2016 passed in I.A.No.446 of 2014 in I.A.No.90 of 2012 in O.S.No146 of 2009 on the file of the District Munsif, Sankari by allowing this Civil Revision Petition.

(Amended as per order dated 16.03.2021 in C.M.P.No.5317 of 2017 in C.R.P.No.3994 of 2016)

For Petitioner : Mr.V.Lakshminarayanan
for Mr.R.Marudhachalamurthy

For Respondents : Mr.N.Manokaran

ORDER

This Civil Revision Petition has been filed against the order dated 03.11.2016 passed in I.A.No.446 of 2014 in I.A.No.90 of 2012 in O.S.No146 of 2009 on the file of the District Munsif, Sankari.

2).The petitioner is the 4th defendant in the suit filed by the respondents herein for declaration and permanent injunction in respect of the suit property. Even though the petitioner has received the summons, he failed to appear before the Court below and therefore, an ex-parte decree was passed against him. Thereafter, the petitioner has filed a petition to set

aside the ex-parte decree along with a petition to condone the delay of 582 days and the Court below had dismissed the delay petition by an order dated 03.11.2016. Hence the present Civil Revision Petition has been filed.

3).The learned counsel for the petitioner submitted that the Court below had dismissed the delay petition in I.A.446 of 2014 on the ground that sufficient reasons have not been assigned to condone the delay. Earlier, without filing the delay petition, the petitioner has filed a petition to set aside the ex-parte decree passed against him in the suit. Only, thereafter, the petitioner came to know about the delay of 582 days in filing a petition to set aside the ex-parte decree. Therefore, he has filed the petition to condone the delay of 582 days in filing the petition to set-aside the ex-parte decree petition.

3.1).The petitioner was suffering from Jaundice and since he has taken native treatment, he could not produce any medical records to that effect. He further submitted that after receiving the summons, he has

misplaced the same. Hence, he was unable to appear before the Court below. Therefore, he may be given an opportunity to defend the suit.

3.2).The learned counsel for the petitioner submitted that the suit is filed by the respondent for a declaration, declaring that the settlement deed executed in favour of the petitioner dated 05.01.2009 as null and void. Further, that the petitioner is the main contesting defendant, hence, he may be given an opportunity to defend the suit on merits and in accordance with law. He further submitted that the judgment passed by the Court below is not in consonance with Order 20 Rules 4 and 5 of CPC. Though the Court below had passed the ex-parte decree for non-filing of the written statement, it has to satisfy the Provisions under Order 20 Rule 4 and 5 of CPC. The suit is filed for declaration and permanent injunction and normally the Court ought to have considered the condone delay petition in liberal manner as per the law laid down by the Hon'ble Supreme Court as well as by this Court.

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3.3).He further submitted that the petitioner has specifically assigned proper reasons in the affidavit filed in support of the condone delay petition.

The length of delay is no matter and sufficiency of the explanation is the relevant criteria. In support of his contention he relied upon the following judgements:-

(i)***C.M.A.No.3700 of 2010-Meenakshisundaram Textiles Vs. Valliammal Textiles Ltd.,.***

(ii)***C.R.P(NPD).No.1619 of 2017 and C.M.P.No.7654 of 2017-M.Chandra Vs.N.Boopathy.***

(iii)***C.R.P.(MD).No.2003 of 2011 and M.P(MD).No.1 of 2011-Vijayakumari and others Vs. M.Veeranan and others***

(iv) ***C.R.P.(NPD)(MD) Nos.1303 of 2012, 871 of 2013 and M.P.(MD).No.1 of 2012 in C.R.P.(NPD) (MD) No.1303 of 2012 - R.Stella Vs. V.Antony Francis.***

(v)***C.R.P.No.438 of 2018 and C.M.P.No.2315 of 2018-Ramachandran and others Vs. Balakrishnan and others.***

Therefore, he prays to allow the Civil Revision Petition and thereby to set aside the order passed by the Court below in the condone delay petition.

4).The learned counsel for the respondents contended that the summons in the suit was duly served to the petitioner herein. Even thereafter, he failed to appear before the Court below, and hence, he was set ex-parte on 08.06.2009. Thereafter, ex-parte decree has been passed by the Court below on 21.08.2009. He further submitted that the petitioner ought to have calculated the date from the date of ex-parte decree and till the date of filing petition under Order 9 Rule 13 of CPC. The petitioner conveniently omitted a large number of days and filed a petition to set aside exparte decree.

4.1).In the affidavit filed in support of the condone delay petition, the reasons for the delay in filing the petition to set aside the ex-parte decree has not been specifically stated. The present Civil Revision Petition is filed only against the dismissal order of the condoning delay petition, as such the petitioner cannot question the decree that it is not in consonance with Order 20 Rules 4 and 5 of the CPC and there is no specific grounds raised in the Civil Revision Petition. He further submitted that the Court below had decreed the suit for non-filing of the written statement under Order 8 Rule

10 of CPC. Therefore, the judgment was passed on merits and its relevant paragraphs is extracted hereunder:-

"written statement of D2, D3 not filed and hence D2 and D3 are called absent set ex-parte. D1 and D4 already set ex-parte. P.W.1 examined. Petition U/or. 7 R1. 14(3) of CPC. filed in I.A.No.1027/2009 is allowed. Ex.A1 to A5 are marked claim is proved suit is decreed as prayed for. No Costs."

4.2).In support of his contention, the learned counsel for the respondents replied upon the following judgments:-

(i)1981(4)SCC 1-State of Gujarat Vs.Sayed Mohd. Baquir EI Edross.

(ii)2007 (14) SCC 772- S.V.Matha Prasad Vs.Lal Chand Meghraj and others.

(iii) 2009 (2) SCC 667 -State of Jharkhand and others-Vs.Ashok Kumar Chokhani and others.

(iv) 2019 (11) SCC 384-Mohd. Sahid and others-Vs-Raziya Khanan & others.

(v) AIR 1995 GUJ 29-Municipal Corporation of Ahmedabad Vs. Voltas Limited and others.

(vi)2007(8) SCC 329-Saroja Vs Chinnusamy and others.

(vii)2017 (6) CTC 187- ViJay Singh Vs. Santhi Devi and another.

(viii)2013 (12) SCC 649-Esha Bhattacharjee Vs. Managing Committee of Raghunathpur.

(ix)2013 (14) SCC 81- Baswaraj and another Vs. Special Land Acquisition Officer,

(x)2006 (7) SCC 452-Vidyodaya Trust and others Vs.Mohan Prasad R and others,

(xi)2014 (15) SCC 529 - Rajinder Kumar Vs. Kuldeep Singh and others,

(xii)1990(1)Civil LJ 349- D.M.Krishnadas Vs.T.Chathu and others

(xiii)2010 (9) SCC 437-Kalabharati Advertising Vs. Hemant Vimalnath Narichania and others.

4.3).The learned counsel for the respondent further stated that the petitioner had failed to produce any material evidence to show that he was suffering from Jaundice and the reasons stated in the condone delay petition are contrary to the facts.

5).Heard, Mr.V.Lakshminarayanan for R.Marudhachalamurthy, learned counsel appearing for the petitioner and Mr.N.Manokaran, learned counsel appearing for the respondents.

6).In this Civil Revision Petition, the following questions arise for consideration:-

(i) Whether the petition to condone the delay of 582 days in filing a petition to set aside the ex-parte decree can be allowed ?

(ii) Whether the judgment passed by the trial Court in O.S.No.146 of 2019 is consonance with Order 20 Rules 4 and 5 of CPC ?

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7).The learned counsel for the petitioner has relied upon the several reported judgments and its relevant paragraphs are extracted hereunder:-

(i) **CMA No.3700 of 2010 of 2010 - Meenakshisundaram Textiles**

Vs. Valliammal Textiles Ltd., the relevant paragraphs are extracted here under:-

17. Section 2(2) of the Code of Civil Procedure defines

a "decree" as follows:-

"2(2) "decree" means formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

In order to bring a decree within the provisions of Section 2(2), the following essential elements are necessary. There must be a suit, as such a decree could be given only in relation to a suit. There must be an adjudication of the dispute. Adjudication means the judicial determination of the matter in dispute. Adjudication, in other words, also would mean that the Court must have applied its mind to the facts of the case to resolve the matter in dispute. Such adjudication must be about any or all the matters in controversy in the suit. After adjudication, there must be a conclusive determination of the rights of the parties. Finally, in order to pass a decree, the Court must formally express its decision in the manner provided by law. In this regard, the provisions of Section 33 of Code of Civil procedure are also relevant to be kept in mind. That provision states that the decree shall follow on the basis of the judgment pronounced. "

(ii)CRP(NPD) No.1619 of 2019-M.Chandra Vs.N.Boopathy, the relevant paragraphs are extracted here under:-

"10) In the light of the decisions cited Supra, ex-parte judgment passed by the Court below is not in consonance with Section 2(9) of C.P.C and therefore, it is clear that the judgment passed by the Court below is cryptic, without

following the procedure as contemplated under Section 2(9) of C.P.C. The impugned order passed by the Court below in I.A.No.2369 of 2016 dismissing the application for condoning the delay of 292 days in filing the set aside petition is liable to be set aside."

(iii)CRP(MD) No.2003 of 2011-Vijayakumari and others Vs.Veeranan and others, the relevant paragraphs are extracted here under:-

"12)It is no doubt true that the delay of 1036 days is inordinate but this Court should also take note of the said ex-parte judgment, based on which execution petition has been filed and the sale deed was obtained by the plaintiff. Order XX Rule 4 CPC would clearly state that the judgments of the Courts shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. However, the judgment in the instant suit does not conform with these requirements as provided under Order XX Rule 4 CPC and does not reflect the issues involved in the present case. In a suit for specific performance, the Courts have to definitely consider the fact as to whether the plaintiff has been ready and willing to perform his part of the contract and the judgment in question does not spell out whether the issue has been considered. The issue regarding readiness and willingness to perform the obligation under the contract is a

sine qua non for a suit for specific performance."

(iv)CRP (NPD)(MD).No.1303 of 2012-R.Stella Vs. V.Antony

Francis and the relevant paragraphs are extracted here under:

"19)It is clear from the above judgments that where the defendant contests a suit or submits himself to a decree, it is the bounden duty of the trial Court to follow the procedure under Order XX Rule 4 of the Civil Procedure Code, by giving the concise statment of the case, the points for determination, the decision thereon and the reasons for such decision. If this is not satisfied and a cryptic unreasoned judgment is passed, it is ex facie illegal. When a Court considers an application for delay to set aside the ex-parte decree, this must also be taken into consideration. If the original judgment itself is ex-facie illegal, it cannot be allowed to continue and under such circumstances, it will have a bearing, while the Court considers an application to condone the delay to set aside the ex-parte decree. The Court need not have a pedantic approach in this regard, since it involves the substantial right of the parties."

(v)CRP (PD) No.438 of 2018-Ramachandran and others

Vs.Balakrishnan and others, the relevant paragraphs are extracted here under:

"16. A Division Bench of this Court in ***M/s.Meenakshisundaram Textiles v. M/s.Valliammal Textiles Ltd.***, reported in 2011 (3) LW 80, has pointed out that even an *exparte* judgment must contain bare minimum facts, the point for determination, the evidence adduced and the application of those facts and evidence for deciding the issue. A judgment which does not contain the above would not qualify to be called a judgment. While considering the scope of the definition of the judgment under Section 2(9) of the Code of Civil Procedure read with Order 20 Rule 6(a), the Division Bench has held as follows:

"10. Judgment not containing the bare minimum facts, the point for determination, the evidence adduced and the application of those facts and evidence for deciding the issue would not qualify it to call as "judgment".

11. When the defendant is set *exparte*, the burden is heavy on the Court, as it would not have the advantage of defence. Therefore, the Court should be extra careful in such cases and they should

consider the pleadings and evidence and should arrive at a finding as to whether the plaintiff has made out a case for a decree.

12. The “judgment” should contain the brief summary of the facts, the evidence produced by the plaintiff in support of his claim and the reasoning of the learned Judge either for decreeing the suit or its dismissal. The Civil Procedure Code does not say that the Court is bound to grant a decree in case the defendant is absent. The practice of writing a judgment indicating that the defendant was ex parte and as such the claim was proved and the suit was decreed, deserves to be Condemned.”(Emphasis Supplied)

17. The appeal before the Division Bench was one against an order refusing to set aside an ex parte decree filed under Order 43 Rule 1 (d) of the Code of Civil Procedure. The Division Bench went on to set aside the judgment and decree solely on the ground that it is not in conformity with the provisions of the Code of Civil Procedure. The Division Bench had also concluded that such judgments and decrees which

show total non-application of mind on the part of the Trial Court will have to be set aside.

18. I therefore, have no hesitation to invoke the powers under Article 227 of the Constitution of India, to set aside the judgment and decree dated 17.07.2009 made in the suit viz., OS No.2 of 2008 on the file of the IInd Additional Sub Court, Villupuram. The Civil Revision Petition is therefore allowed. Consequently, the connected miscellaneous petition is closed."

(vi)CRP.(NPD).No.4324 of 201-Shanthimalai Trust Vs Arunachala Education and Environment and others, the relevant paragraphs are extracted here under:

"32. The learned Subordinate Judge in his report has stated that counsels for either side have been taking time on the ground that the Writ Petition is pending in this Court. I am therefore of the considered opinion that this is a fit case where the powers of this Court under Article 227 of the Constitution of India, will have to be exercised to put the suit back on track, so that the rights of the contesting parties are determined at the earliest. No doubt the Hon'ble Supreme Court has pointed out that there is an alternative remedy available in a Civil Court under the Code of the Civil Procedure, the High Court

shall not ordinarily exercise its powers under Article 227 of the Constitution of India.

34. I do not think the observations of the Hon'ble Supreme Court extracted above would be taken to mean that there is a total bar on the exercise of jurisdiction under Article 227 by the High Courts in cases where a remedy is available under the Code of Civil Procedure. Even the Hon'ble Supreme Court has only said that the availability of a remedy under the provisions of the Code of Civil Procedure may have to be construed as a near total bar. The Hon'ble Supreme Court has not totally debarred the High Courts from exercising their power under Article 227 in appropriate cases, if the High Court feels that the Trial Court has failed in its duty. I find that the Trial Court in the case on hand has not only passed a wholly illegal exparte decree, but it has shirked its responsibility in disposing of the applications for condonation of delay in seeking to set aside the exparte decree within a reasonable time by merely adjourning the proceedings without showing any sense of responsibility.

35. For all the foregoing reasons, I have no hesitation in setting aside the exparte decree dated 28.04.2009, in exercise of my power under Article 227 of the Constitution of India. The

very fact that the exparte decree came to be passed within 30 days of the institution of the suit is by itself a reason to set aside the exparte decree."

7.The Hon'ble Division Bench and the learned single judge of this Court in a number of cases had set aside the exparte judgment and decree solely on the ground that it is not in conformity with the provisions of the Code of Civil Procedure. The judgment and decree dated 29.08.2009 passed by the District Munsif, Sankari and the relevant paragraph of the judgment as extracted hereunder:-

"written statement of D2, D3 not filed and hence D2 and D3 are called absent set ex-parte. D1 and D4 already set ex-parte. P.W.1 examined. Petition U/or. 7 R1. 14(3) of CPC. filed in I.A.No.1027/2009 is allowed. Ex.A1 to A5 are marked claim is proved suit is decreed as prayed for. No Costs."

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8.The judgment, which does not contain the bare minimum facts, the point for determination, the evidence adduced and the application of those

facts and evidence for deciding the issue would not qualify it to be called as "judgment". Further the practice of writing a judgment indicating that the defendant called absent and set as ex-parte and as such the claim was proved and the suit was decreed, deserves to be condemned and it should not be followed by the trial Court.

9.The above judgment is not satisfactory and the unreasoned judgement passed by the Court below is cryptic and it is ex-facie illegal. The Court below while considering the petition to condone delay in set aside the ex-parte decree, must also take this into consideration. It is also relevant upon the judgment reported in **2019 7 SCC 359** in the case of **Robin Thopa Vs Rohit Dora** and the relevant paragraph is extracted hereunder:-

8. Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits.

10.The Order XX Rule 4 CPC would clearly state that the judgement of the Court shall contain a concise statement of the case, the points for

determination, the decision there on and the reasons for such decision. Therefore, the above judgment passed by the Court below does not conform with these requirements as provided under Order XX Rule 4 CPC and does not reflect the issues involved in the present case. The judgment passed by the Court below is cryptic, without following the procedure as contemplated under Section 2(9) of CPC.

11. Insofar as the delay is concerned that the suit is filed for declaration and as if the trial Court considered the delay petition in a liberal manner and it has to be decided on merits. The petitioner categorically stated that he suffered Jaundice and he took native treatment. Therefore, he could not appear before the trial Court. Therefore, the length of delay is no matter and sufficiency of the explanation is the relevant criteria. This Court finds that the ex-parte judgment passed by the trial Court is not in consonance with Order 20 Rule 4(ii) of CPC. Therefore, this Court has no hesitation to invoke the powers under Article 227 of the Constitution of India to set aside the ex-parte judgement and decree dated 29.08.2009 passed by the District Munsif, Sankari.

12. Accordingly, the Civil Revision Petition is allowed and the order passed in the condone delay petition is set aside and the same is allowed on condition that the petitioner shall pay a sum of Rs.20,000/- as costs to the respondents within a period of two weeks from the date of receipt of a copy of this order. The costs shall be paid to the counsel appearing for the respondents in this Court. If the petitioner fails to comply with the order, the order stands automatically cancelled and the order passed by the Court below will be confirmed. No Costs. Consequently, the connected miscellaneous petition is closed.

26.03.2021

Index: Yes / No
Speaking order / Non speaking order

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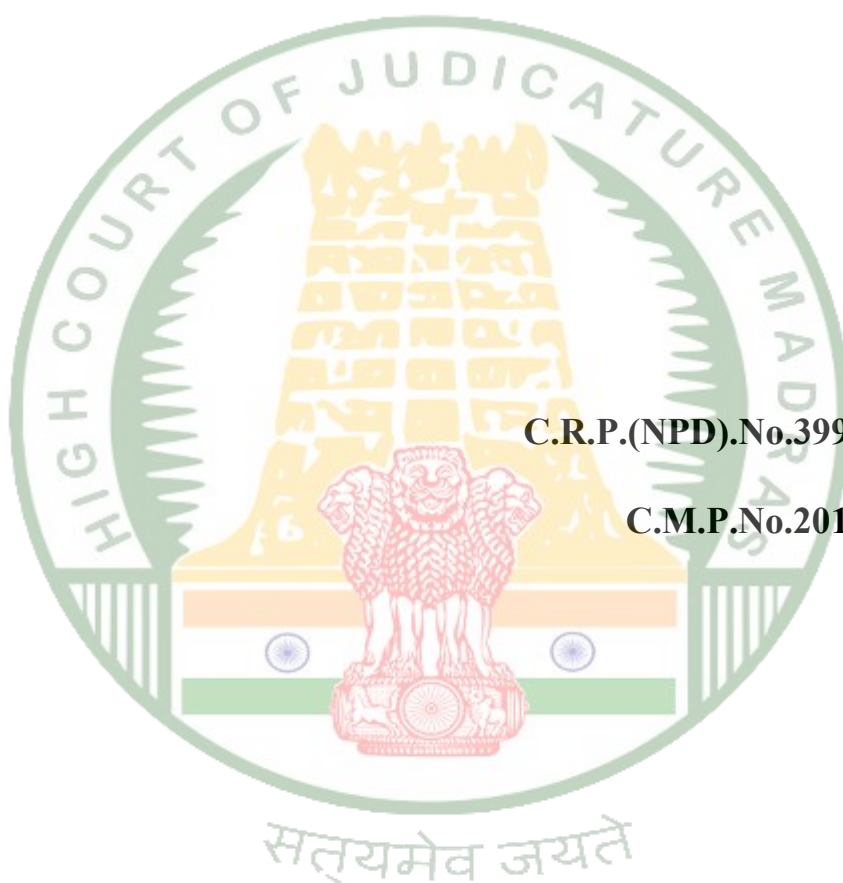
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