IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :27/07/2021 Pronounced on : 30 /07/2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

A.No.2388 of 2021
in
C.S.No.667 of 2018

Y.Rubandas ..Applicant/Defendant

/versus/

M/s Denwood Merchandisingand Industries Private Limited,
Represented by its Authorised Representative,
Mr.P.Deepak Kothari,
No.C-13/11, 2nd Floor,
10th Street, C Block,
Anna Nagar East, Chennai 600 102. ..Respondent/plaintiff

Prayer: Application has been filed under Order XIV, Rule VIII of O.S. Rules, read with Section 5 of the Limitation Act, praying to condone the delay 799 days in filing the application to set aside the preliminary decree dated 21.01.2019 passed in the above suit.

For Applicant :Mr.K.Bijai Sundar
For Respondent :Mr.K.Surendar

O R D E R

(This case has been heard through Video Conferencing)

This application is filed to condone the delay of 799 days in filing the application to set aside the preliminary decree dated 21.01.2019 in C.S.No.667 of 2018.

2.The affidavit filed along with the application, which runs to 15 pages and 47 paragraphs, mainly harping on the point that the plaintiff has committed fraud on the Court and therefore, there is no necessity to file an application to condone the delay and the present application is filed for technical reasons.

3.Relying upon the observations by the Hon'ble Supreme Court in ***S.P.Chengalvaraya Naidu v. Jagannath reported in 1994 SCC (2) page 1***, wherein the Hon'ble Supreme Court has held that, the judgment or decree obtained by the plaintiff by playing fraud on the Court is a nullity and non-est in law, the applicant herein wants to fit his case within the said parameter to condone the delay of 799 days in filing the application to set aside the exparte preliminary decree.

4.However, on going through the records, this Court finds that it is a clever drafting of the counsel to delay the execution of the final decree passed by this Court and the subsequent proceedings. The suit in C.S.No.667 of 2018 was filed as a commercial suit before this Court for recovery of Rs.3 crores along with a future interest calculated at the rate of 24% per annum. In the plaint, it has been stated that the defendant borrowed loan of Rs.50 lakhs for his business purpose. On 13.12.2011 the defendant executed pro-note and mortgage deed. Having failed to discharge the entire loan, a Memorandum of Understanding was entered between the parties on 16.04.2018. Since the defendant failed to adhere the time fixed under Memorandum of Understanding, the suit has been filed after causing notice. It is stated in the plaint that the dispute involved in the suit is a commercial dispute within the meaning of 2(1)(c)(i) of the Act 4 of 2016 and the money sought to be recovered in the suit is above the specified value as stipulated under Section 2(i) of Act 4 of 2016. The cause of action arose within the jurisdiction of this Court at the office of the plaintiff at No.1 Barnaby Road, Kilpauk, Chennai where the loan agreement, promissory note and memorandum of understanding were executed.

5.The suit summon was served on the defendant but the defendant did not enter appearance. He was set exparte on 07.01.2019 and after examination of witnesses and marking of 10 documents, this Court on 21.01.2019 passed the following preliminary decree.

> "19.The prayer paragraph that has been extracted supra will reveal that the suit is on the foot of a mortgage, i.e., mortgage of an immovable property which has been set out in the schedule. As the suit is on the foot of a mortgage, a time frame has to be fixed for defendant for satisfying the decreetal amount and in default, the plaintiff will be entitled to sell the schedule mentioned property i.e., mortgaged property and realise the dues. A time frame of three months is fixed. Defendant shall satisfy the decree within three month from the date on which certified copies of judgment

> and decree are made available by the Registry.
>
> 20.Defendant should make good payment as per this decree within aforesaid three months. In default of defendant satisfying the decree within the aforesaid time frame of three months, the plaintiff company will be entitled to sell and/or deal with the immovable property which is subject matter of mortgage as set out in the plaint."

6.Pursuant to the preliminary decree, the plaintiff has taken out the application No.483 of 2020 for passing of final decree.

7.At this juncture, the defendant has entered appearance and his counsel has sought time to comply with a substantial portion of the amount determined in the preliminary decree. Therefore, on 31.07.2020, this Court considering the request of the defendant's counsel, has adjourned the matter to 19.08.2020. On that date, the defendant has not come forward to pay a substantial portion of amount determined in the preliminary decree, so recording his failure, final decree came to be passed by this Court on 21.08.2020.

8.While passing the final decree, this Court has observed as below:-

> "6.Notice has been directed to the respondent/defendant and Mr.S.M.Sundaramoorthy, learned counsel had entered appearance. On 16.07.2020, this Court had stated that the defendant/respondent should come forward with an affidavit indicating a time schedule within which he would comply with a substantial portion of the amount determined in the preliminary decree. Thereafter, the matter was adjourned to 31.07.2020. The learned counsel took time to file necessary affidavit as directed. The matter had been listed again today. There is no representation on behalf of the respondent/defendant. Accordingly, the respondent/defendant is set exparte. It is made clear that he is not interested in participating in the judicial proceedings."

9.To satisfy the final decree, an Advocate Commissioner was appointed by the Court to identify and measure the mortgaged property. Accordingly, Mr.J. Perumal Samy, Advocate Commissioner, has inspected the mortgaged property, measured, obtained valuation certificate and produced the same before this Court. The plaintiff/decree holder has taken steps for proclamation of sale.

10.At this juncture, the present application is filed by the defendant to set aside the preliminary decree dated 21.01.2019. It is to be noted that this application along with the affidavit was sworn by the applicant on 28.04.2021. By the time, this Court has already passed final decree in A.No.483 of 2020 in C.S.(Comm.Div.)No.667 of 2018 by order dated 21.08.2020. Final decree was passed after affording adequate opportunity to him. So, the applicant cannot say that he is not aware of the final decree passed on 21.08.2020, subsequent to preliminary decree dated 21.01.2019. Quoting his ill-health and certain medical records in this application, the defendant claims that he was not in a position to give instruction to his counsel and to proceed with the case and he accuse the respondent/plaintiff for suppression of material facts and fraud.

11.The learned counsel appearing for the applicant/defendant submitted that the suit is not a commercial dispute. The property mortgaged is an agricultural property. There is no allegation of commercial transaction between the plaintiff and the defendant. The loan transaction with future interest at the rate of 24% is per se illegal. The entire suit transaction took place only outside the territorial jurisdiction of this Court. The plaintiff has suppressed the fact of power of attorney executed by the defendant in favour of one Srinivasan, Manager of the plaintiff's company. Whether the plaintiff is a non-banking institution or a non-banking finance company is not made clear. As such the suit itself is not maintainable. Hence, the decree passed is non est in law, vitiated by fraud.

12.As pointed out earlier, there is no sufficient cause for condoning the delay of 799 days to set aside the ex parte preliminary decree passed on 21.01.2019. Further, final decree itself has been passed in this case on 21.08.2020. The preliminary decree dated 21.01.2019 has got merged with the final decree. Hence, the application to set aside the preliminary decree is not maintainable. Even otherwise, for lack of justifiable reason to condone the enormous delay of 799 days, this application is liable to be dismissed.

13.Having received the suit summon and entered appearance through a counsel, the defendant has allowed the suit to go ex parte. Only after passing of the final decree and visit of the Advocate Commissioner to the suit property for identification, the present application is filed.

14.It is pertinent to point that, earlier the defendant has made an attempt to set aside the exparte order. A perusal of the record indicates that that the applicant in A.No.1988 of 2020 dated 04.09.2020 filed to set aside the exparte order passed on 21.08.2020 in A.No.483 of 2020. In the affidavit filed along with the application, the applicant has accepted the loan transaction for business purpose and the substantial repayment towards the said loan. In paragraph No.6 of the said affidavit, the applicant has specifically stated that " apart from making cash payment as mentioned in para No.5, I have also given Letter of Credit of various parties to the plaintiffs, and it is the usual business transaction between us that amounts would be available by the plaintiffs on the basis of the Letters of Credit of various parties". After admitted commercial transaction, to say that the present suit is not a commercial dispute, an afterthought and contrary to his earlier affidavit.

15.The other allegation against the plaintiff made by the learned counsel appearing for the applicant is that this Court lack territorial jurisdiction to entertain the suit. The plaintiff has suppressed the fact that all the transactions and documents were executed outside the territorial jurisdiction of this Court. But, on perusing the documents, this Court finds that the defendant has executed the loan agreement on 13.12.2011, wherein the plaintiff residence is shown as No.243, Devdarshan Apartment, No.1, Barbaby Road, Kilpauk, Chennai-600 010. The stamp paper has been purchased from a vendor at No.175, Vellala Street, Purasawalkam, Chennai-600 084 on 12.12.2011 in the name of the defendant. Though the place of the execution of the document is not mentioned. The other document, which was executed on the same day, is the memorandum of deposit of title deeds executed by the defendant in favour of the plaintiff. This is a registered document. The Sub Registrar of Arakkonam has registered this document on 13.12.2011 between 3.00p.m. and 04.00 p.m., The third document is the pro-note executed by the defendant in favour of the plaintiff on 13.12.2011 at Chennai. Besides this document, the plaintiff and the defendant have entered into the memorandum of understanding on 16.04.2018 at Chennai, wherein the defendant has agreed to pay a sum of Rs.1.05 crores towards the discharge of the loan as follows:-

S.No.	*Amount in Rs.*	*Month*
1.	50,00,000-00	In May 2018
2.	25,00,000-00	In June 2018
3.	5,00,000-00	In July 2018
4.	25,00,000-00	In August 2018

This document is executed at Chennai and the parties have agreed in the Memorandum of Understanding, that it is subject to Chennai jurisdiction and can be referred for Arbitration also. Having executed documents at Chennai, except mortgage deed, the applicant/defendant, without any compunction accuses the plaintiff due to his misrepresentation, the Court has wrongly assumed jurisdiction.

16.Yet another allegation made by the applicant is against the respondent in suppression of the power of attorney executed by the plaintiff in favour of Mr.Srinivasan on 13.12.2011 in respect of the suit property. The applicant claims that the plaintiff has suppressed the fact regarding the general power of attorney given in favour of Srinivasan. In fact, the documents filed by the applicant indicates, the applicant had cancelled the said power of attorney. It is an unilateral cancellation by the applicant/defendant in the year 2014. Having cancelled the power of attorney unilaterally long back, the applicant now to accuse the plaintiff alleges fraud and suppression. The said power of attorney in favour of one Srinivasan who is the Manger of the plaintiff's company and its unilateral cancellation is no way relevant for the case on hand as the unilateral cancellation by the defendant itself was four years prior to the initiation of the suit

17.The learned counsel appearing for the applicant stated that the plaintiff has suppressed the fact that the suit property, which was mortgaged to the plaintiff is an agricultural land.

18.This Court finds no suppression in that also. In fact, the learned Advocate Commissioner has got the guideline value of the near by property. They were sold as residential plot and he has valued the property on square feet basis.

19.The learned counsel appearing for the applicant/defendant wants to impress upon the Court that the defendant is an agriculturist and not a business man. The property, which is mortgaged, is an agricultural land. Contrarily, the defendant himself has admitted in his own affidavit that he had business transaction with the plaintiff and the property was mortgaged pursuant to the loan availed in the course of business transaction. Besides, the suit property was settled in favour of the defendant under settlement deed dated 21.03.2011 by his wife.

20.Normally, in the application to condone the delay filed under Section 5 of the Limitation Act, the Court always restricts to the cause shown for the delay. In this case, since the applicant had raised the ground of fraud and suppression of facts to impress upon this Court that the exparte decree to be set aside in view of fraud and suppression, this Court ventured upon to find out whether there was any truth in the allegation.

21. The learned counsel appearing for the plaintiff had pointed out all the facts discussed above to disprove the allegation of misrepresentation and suppression of fact. To get rid of the unexplained delay of 799 days, the applicant/defendant has invented the reason and has taken advantage of certain observations made in *S.P.Chengalvaraya Naidu* case, which in fact, is totally not applicable to the case on hand.

22.For the said reasons, **the Application to set aside the preliminary decree dated 21.01.2019 is dismissed as devoid of merits**. No order as to costs.

30.07.2021

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Index:yes/no
Internet:yes/no

Dr.G. JAYACHANDRAN,J.

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Pre-delivery order made in
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in
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<u>30.07.2021</u>