

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRP(NPD).No.808 of 2016

and

CMP.No.4459 of 2016

A.E.Kalyanasundaram

... Petitioner

Vs.

Minor.Mangaiyarkarasi

Rep.by her Mother and natural guardian

Thillana Mohanambal

... Respondent

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decretal order dated 23.07.2015 made in I.A.No.262 of 2014 in O.S.No.39 of 2008 on the file of the District Munsif Court, Chengalpattu.

For Petitioner : Mr.M.Guruprasad

For Respondent : Mr.A.Prabakaran

ORDER

This Civil Revision Petition is directed as against the fair and decretal order passed in I.A.No.262 of 2014 in O.S.No.39 of 2008 dated 23.07.2015 on the file of the learned District Munsif, Chengalpattu, thereby dismissing the petition to condone the delay in filing the application to set aside the ex-parte decree.

2. The petitioner is the second defendant in the suit filed by the respondent herein. The respondent filed a suit for declaration and injunction in respect of the suit properties. According to the petitioner, he purchased the Item No.4 of the suit schedule property.

3. On a perusal of the affidavit filed in support of the condone delay petition, it reveals that the petitioner engaged one Bharathi Anna Advocate to defend the suit filed by the respondent herein. Unfortunately, he failed to inform about the filing of the written statement and as such, he was set ex-parte and the ex-parte decree was passed as against the petitioner herein.

That apart, the Court below passed the ex-parte judgment as follows:-

“2. Plaintiff present and examined as P.W.1 in chief through affidavit. Ex.A.1 to Ex.A.9 marked. Argument heard.

Judgment pronounced. Heard perused. Satisfied.

In the result, suit is decreed as prayed for. No costs.”

4. Though the trial Court has stated that P.W.1 was examined and Exs.A1 to A9 were marked, subsequently, the Court below stated that both sides exhibits and witnesses Nil. The Hon'ble Supreme Court of India and this Court repeatedly held that the judgment of the Court below should be in consonance with Order 20 Rules 4 and 5 of the Civil Procedure Code.

5. 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 statement 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 *exparte* 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 *exparte* 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 *ex parte* decree, but it has shirked its responsibility in disposing of the applications for condonation of delay in seeking to set aside the *ex parte* 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 *ex parte* decree dated 28.04.2009, in exercise of my power under Article 227 of the Constitution of India. The very fact that the *ex parte*

decree came to be passed within 30 days of the institution of the suit is by itself a reason to set aside the ex parte decree."

6. The Hon'ble Division Bench and the learned single judge of this Court in a number of cases had set aside the ex parte judgment and decree solely on the ground that it is not in conformity with the provisions of the Code of Civil Procedure.

7. 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.

8. 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.

9. 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.

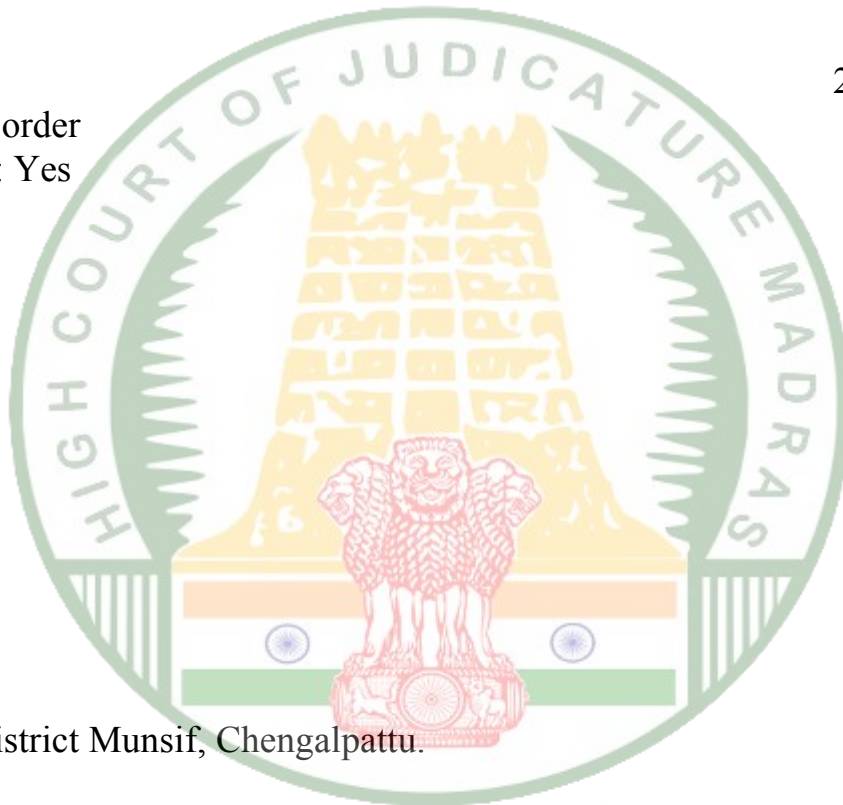
10. Insofar as the delay is concerned that the suit is filed for declaration and as if the trial Court considered the delay petition in a liberal manner and it has to be decided on merits. The petitioner categorically stated that he suffered with Jaundice and he took native treatment. Therefore, he could 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 15.04.2008 passed by the learned District Munsif, Chengalpattu.

11. In view of the same, this Civil Revision Petition is allowed and the order passed in I.A.No.262 of 2014 in O.S.No.39 of 2008 dated 23.07.2015 is set aside on condition that the petitioner shall pay a sum of Rs.10,000/- as costs to the respondent within a period of two weeks from the date of receipt of a copy of this order, failing which this order shall stand automatically cancelled. The petitioner is directed to file his written

statement within a period of two weeks after setting aside the ex-parte decree. Thereafter, the trial Court is directed to dispose of the suit within a period of six months. Consequently, the connected Miscellaneous Petition is closed.

29.03.2021

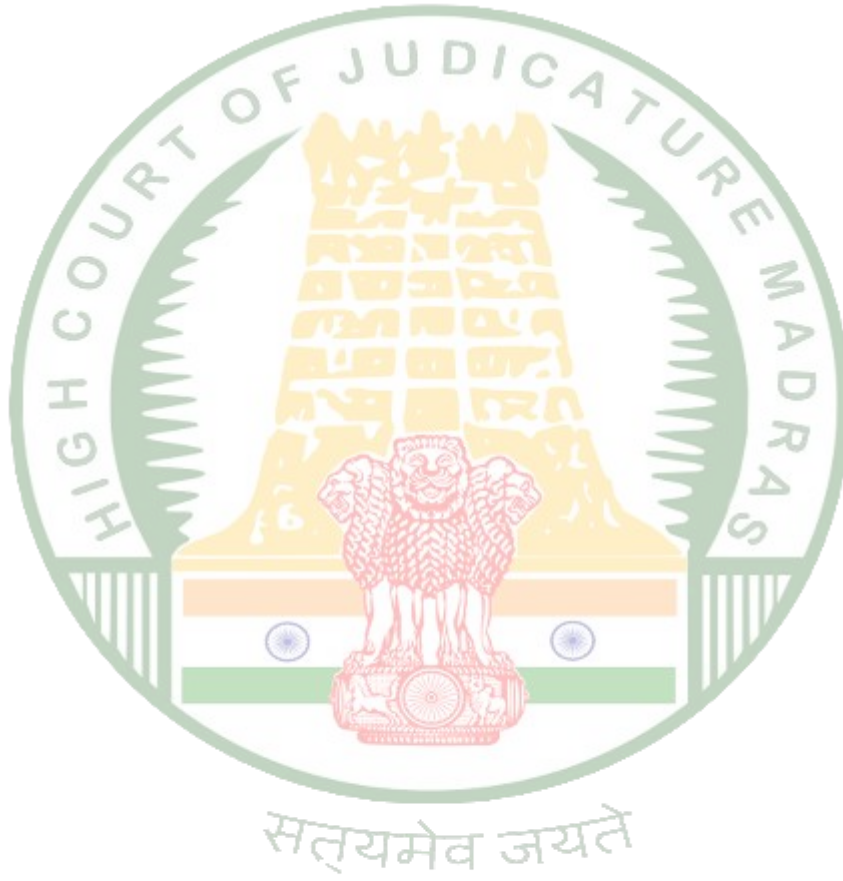
Speaking order
Index : Yes
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To

1. The District Munsif, Chengalpattu.
2. The Section Officer,
V.R.Section, High Court of Madras.

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G.K.ILANTHIRAIYAN,J.

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