

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRP(NPD) No.1961 of 2017
in
CMP.No.9499 of 2017

S.Maheswari
W/o.Shanmugasundaram

... Petitioner/Petitioner/1st Defendant

Vs.

K.Sarasu
W/o.S.Kumarasamy

...1st Respondent/1st Respondent/Plaintiff

S.Kumarasamy
S/o.Subbaiya Gounder

...2nd Respondent/2nd Respondent/2nd Defendant

PRAYER: Civil Revision Petition filed under Section 115 of Civil Procedure Code to set aside the fair and final order and decree in the Interim Application I.A.No.1247 of 2016 filed in Original Suit O.S.No.188 of 2014 on the file of the IInd Additional District Judge of Tiruppur, dated 22.03.2017.

For Petitioner : Mr.Niranjan Rajagopal for
M/s.Mathuvanthi Mathavan
For Respondent-1 : Mr.Myilsamy
For Respondent-2 : NA

ORDER

(This case has been heard through video conference)

This revision petition has been filed to set aside the fair and final order and decree in the Interim Application in I.A.No.1247 of 2016 in O.S.No.188 of 2014 on the file of the II Additional District Judge of Tiruppur, dated 22.03.2017.

2. The brief of the case is that the petitioner is the first defendant in O.S.No.188 of 2014 filed by the first respondent/plaintiff seeking for specific performance. Since, the petitioner/first defendant did not appear before the Court, she was set ex-parte and later an ex-parte decree was passed on 22.03.2016. The petitioner on coming to know about the ex-parte decree had file a petition in I.A.No.1247 of 2016 on 06.09.2016 seeking to condone the delay of 149 days for filing the petition to set aside the ex-parte decree. In the petition to condone the delay, it had been stated that the petitioner was bed ridden for a longer period from February 2016 and that she recovered from illness only few days before the filing the petition and since, she was advised to take bed rest, she was unable to get in touch with her counsel and thereby, there had been delay. It had been further stated that when the case had been posted on 10.02.2016 for cross examination of

PW.1, the petitioner did not appear before the Court and thereby, she was called ex-parte. Subsequently, the case was posted to 17.02.2016 for examination of further witnesses and again the case was adjourned to 05.03.2016 and thereafter, judgment was pronounced on 11.03.2016 and since, the knowledge about the ex-parte decree was known to the petitioner only during the first week of September 2016, she had contacted her Counsel and thereafter, the petition to set aside the ex-parte decree was filed along with a petition to condone the delay of 149 days.

3. The respondent/plaintiff had filed a counter objecting to condone the delay in which, it had been stated that the petitioner had willfully evaded from appearing before the Court and allowed the Court to pass ex-parte decree and thereafter, the petition to condone the delay was filed with a delay of six months. Further it had been averred that on an earlier occasion also, the petitioner had been set ex-parte and thereafter on a petition filed by the petitioner, the ex-parte order was set aside. Further, it had been averred that the case was posted for cross examination of the plaintiff on 18.12.2015, 11.01.2016, 22.01.2016, 29.01.2016, 10.02.2016 and on the request of the petitioner/defendant, adjournments were granted by the Court and that only during the month of February 2014 she had fell ill and that

prior to that the petitioner/defendant was keeping good health. Further, objection was also raised stating that the petitioner had willfully evaded from appearing before the Court to protract the proceedings and that no proper supporting reasons have been stated to satisfy the Court to condone the delay.

4. The trial Court after hearing both sides, finding that the petitioner has not shown any sufficient cause, had dismissed the petition to condone the delay. Further, the trial Court had stated that the petitioner was earlier set ex-parte on 18.02.2015 and the ex-parte order decree was passed on 11.03.2016 and thereafter, the ex-parte order was set aside. Thereafter, case was again listed in the special list for trial on 10.12.2015 and the respondent/plaintiff was examined as PW.1 on that day and Exs.P1 to P8 were marked on that day. Thereafter, the case was adjourned to 18.12.2015 for cross examination and though the respondent/plaintiff was present on that day, on the request of the petitioner/defendant the case was adjourned and on 11.01.2016, the second defendant was set ex-parte and that the 2nd defendant had also submitted the decree. Again the case was posted on 22.01.2016 for cross examination of the respondent/plaintiff/PW1 and the respondent/Plaintiff/PW.1 was present on 22.01.2016. Even on that day, she was not cross examined and thereby, the case was adjourned to 29.01.2016 and again

posted to 10.02.2016. Only since the Counsel for the petitioner/1st defendant was not ready for cross examining P.W.1 on 10.02.2016, the petitioner/1st defendant was called absent and set ex-parte and the case was again posted to 17.02.2016 and on 17.02.2016, P.W.2 was examined. Again the case was posted to 22.06.2016 and again the case was taken on 11.03.2016 and on that day, the ex-parte decree was passed. Though the petitioner/1st defendant had stated that she was sick and taking rest from the month of February 2014 to September 2016, no details and supporting documents were produced before the Court. Thereby, the trial Court had dismissed the petition against which, the present revision petition has been filed.

5. The learned Counsel appearing for the petitioner would submit that the petitioner is a lady and that she had engaged a Counsel and it is not a case where the petitioner/defendant had not filed the written statement. She had filed the written statement whereas, the then Counsel had not informed her about the case being listed in the special list for trial and further the 2nd defendant who is the husband of the 1st respondent/Plaintiff had colluded with her and submitted to the decree. He would submit that the petitioner being a lady was not properly advised and thereby there had been a delay of 149 days and that the petitioner had shown sufficient cause. The

absence of the petitioner was not malafide or intentional and the Suit is filed for substantive relief and that the petitioner is the interested party and if the delay is not condoned and the ex-parte decree is not set aside, the petitioner would be put to grave prejudice. In support of his contention, he would rely on the Judgment of the Hon'ble Apex Court in ***Murugesan Vs. Jamuna Rani reported in 2019 20 SCC 803*** and he would submit that the petitioner is prepared to co-operate with the trial Court for expeditious disposal of the Suit and would pray that the petition may be allowed with terms and cost.

6. The learned Counsel for the respondent would submit that it is not the first time the petition to set aside had been filed. On earlier occasion also, the petitioner did not appear before the Court and thereby, she was set ex-parte on 18.02.2015 and thereafter, on a petition filed by her, the ex-parte order was set aside and she was given a chance to contest the Suit. Even thereafter, several opportunities were given to the petitioner and thereafter, the case was posted on special list on 10.12.2015 and thereafter, on several occasion the petitioner/defendant did not appear before the Court and the Court after recording evidence of the respondent/plaintiff and witnesses P.W.2 had passed ex-parte decree on 11.03.2016. He would submit that the

trial Court had rightly finding that the petitioner had willfully evaded from appearing before the Court and cross examining the witnesses, has dismissed the petition. Further, the petitioner had not shown any sufficient cause. Though, it is stated that the petitioner was taking rest from the Month of February 2014 to September 2016, she has not stated what was the ailment and from which doctor she had taken treatment. Thereby, the trial Court has rightly dismissed the petition and that there is no infirmity in the order passed by the lower Court. Hence, he would seek for dismissal of the revision petition.

7. In reply, the learned Counsel for the petitioner would submit that the trial Court ought not to have taken into consideration the past conduct and the Court ought to have seen whether the petitioner had shown sufficient cause for not appearing before the Court on 10.02.2016. The petitioner being a lady has shown sufficient cause for not appearing during February 2016 and that the petitioner cannot be penalized for her previous negligence which had been overlooked and condoned earlier.

8. Heard the learned Counsels and perused the materials on record.

9. It is relevant to refer to the decision of the Hon'ble Apex Court in ***A.Murugesan v. Jamuna Rani* reported in (2019) 20 SCC 803.**

10. From a perusal of the order of the trial court, it is clear that the trial court has taken into consideration the past conduct of the appellant-defendant in the suit, instead of confining the consideration as to whether the appellant has shown sufficient cause or not for not appearing in the matter on 16-3-2009. It is fairly well settled that when an application is filed for setting aside ex parte decree under Order 9 Rule 13 CPC, the only aspect which is required to be considered is whether any sufficient cause is shown for absence in the matter when the matter was called. Without recording the specific finding, on the plea of the appellant that there was sufficient cause, the trial court has committed error in rejecting the application under Order 9 Rule 13 CPC. Even the appellate and the Revisional Court have not considered the matter in proper perspective and rejected the claim of the appellant. The judgment in G.P. Srivastava [G.P. Srivastava v. R.K. Raizada, (2000) 3 SCC 54] supports the case of the appellant. In the aforesaid judgment, the very issue had fallen for consideration before this Court. The relevant Para 7 reads as under: (SCC p. 57)

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing. Unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard-and-fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant

approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

11.The aforesaid view taken by this Court in the judgment referred to above supports the case of the appellant. It is further brought to our notice that on the aforesaid date i.e. 16-3-2009, on which date the suit was listed for trial, in view of the boycott of the courts by the advocates, all other cases were adjourned and only this case was proceeded and ex parte decree was passed.

12.As the suit is for a substantive relief i.e. for grant of decree of specific performance, and further we are satisfied that the appellant has shown sufficient cause for not appearing in the matter when the matter was called on 16-3-2009, we are of the view that it is a fit case to allow the application filed by the appellant, by setting aside the impugned orders. All the courts below committed error in rejecting the application on the grounds which are not relevant to consider the application filed under Order 9 Rule 13 CPC.

13. We are conscious of the fact that all the three courts have held against the appellant, but if we allow the impugned orders to stand, it will result in miscarriage of justice. For the aforesaid reasons, the impugned orders are set aside, consequently IA No. 117 of 2009 filed in OS No. 92 of 1997 on the file of Sub-Judge, Chidambaram, stands allowed.

14. As the suit is of the year 1997, we direct the trial court to dispose of the same as expeditiously as possible preferably within a period of six months from today. Both the parties shall cooperate for proceeding with the trial and for expeditious disposal in the suit. It is also made clear that we have not expressed any opinion on the merits of the matter. It is open for the trial court to decide the issues for consideration independently, uninfluenced by any of the observations made in the impugned order [A. Murugesan v. Jamunarani, 2014 SCC OnLine Mad 12984] or the order passed by this Court.

10. From the records, it is seen that the trial court while dismissing the petition filed under Section 5 of the Limitation Act has held that earlier on 18.02.2015, the petitioner was set ex-parte and thereafter, the ex-parte order was set aside and when the case was posted for cross examination of the witnesses, the petitioner had once again remained ex-

parte. It is the case of the petitioner that when the previous negligence had been over looked and condoned earlier, the Court has to only see whether the petitioner had shown any sufficient cause for the subsequent non appearance. In this case, the trial Court had earlier over looked and condoned the previous negligence. This Court is of the opinion that insofar as the subsequent conduct, the petitioner had shown sufficient cause for non appearance and further the delay is also not huge and thereby, this Court of the further opinion that an opportunity may be given to the petitioner on imposition of terms and cost.

11. Accordingly, the Civil Revision Petition stands allowed and the order dated 22.03.2017 passed in I.A.No.1247 of 2016 in O.S.No.188 of 2014 on the file of the II Additional District Judge, Tiruppur, is set aside and I.A.No.1247 of 2016 in O.S.No.188 of 2014 stands allowed on the following terms;

1. The petitioner shall pay cost of Rs.10,000/- to the 1st respondent/plaintiff by way of Demand Draft or cash and furnish the proof of payment before the Court concerned within a period of two weeks from the date of receipt of the copy of the order, failing which, the order in I.A.No.1247 of 2016 in O.S.No.188 of 2014 dated 22.03.2017 will stand automatically restored.

2. The petitioner also shall file an affidavit that she would cross examine the witnesses on the next hearing date and that she would co-operate for the progress and expeditious disposal of the trial.

12. Since, it is the Suit of the year 2014, the learned trial Judge is directed to give priority and complete the trial within a period of six months from the date of receipt of copy of this order. The observation made in this petition is only for deciding the revision, the trial Court shall not be influenced with the observations made in this order and shall independently deal with the case based on the evidences adduced during trial.

13. With the above observations, this Civil Revision stands allowed. Consequently, connected Miscellaneous Petition is closed.

सत्यमेव जयते

16.04.2021

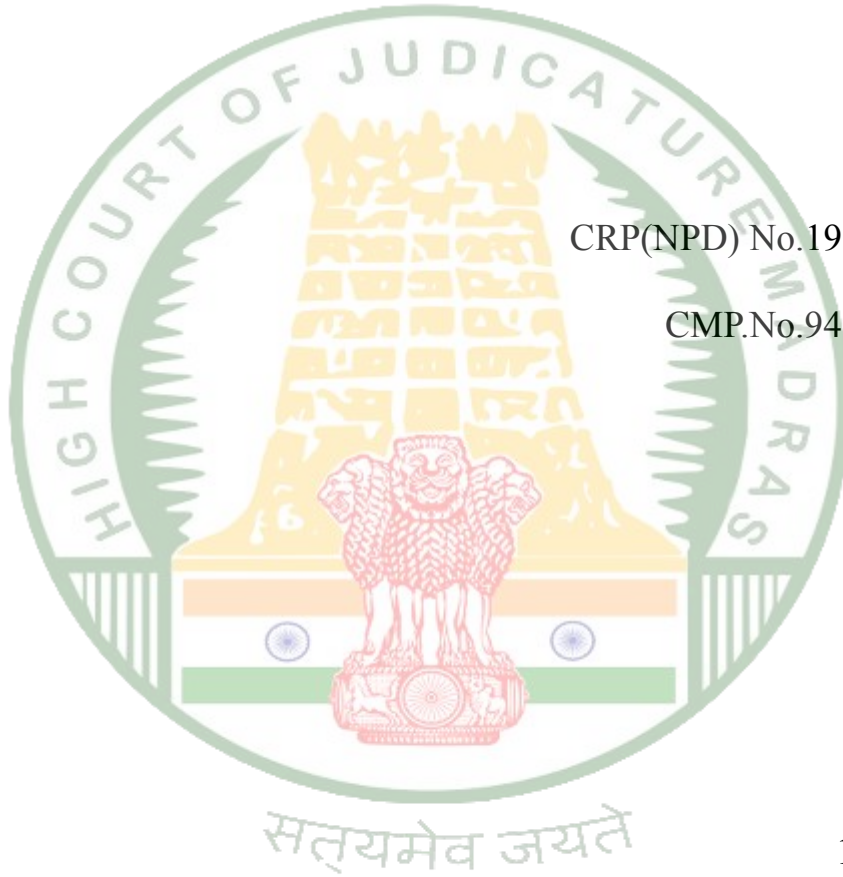
ksa-2

WEB COPY

A.D.JAGADISH CHANDIRA,J.

Ksa-2

To
The II Additional District Judge,
Tiruppur,



CRP(NPD) No.1961 of 2017
in
CMP.No.9499 of 2017

16.04.2021

WEB COPY