

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2021

CORAM

THE HON'BLE MR. JUSTICE A.D. JAGADISH CHANDIRA

**C.R.P. (NPD) No. 2586 of 2017
and
C.M.P. No. 12312 of 2017**

D.Saravanan

... Petitioner

-VS-

K.S.Kanappan

... Respondent

Prayer:- Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, 1908, praying to set aside the fair and decreetal order dated 26.04.2017 passed in E.A. No. 48 of 2012 in E.P. No. 64 of 2010 in O.S. No. 197 of 2001 on the file of the Principal Sub Ordinate Judge at Tiruppur.

For Petitioner : Mr. K.Myilsamy

For Respondent : Mr. A.Deivasigamani
for Mr. S.Saravanan

ORDER

(The case has been heard through video conference)

The Civil Revision Petition has been filed seeking to set aside the fair and decreetal order dated 26.04.2017 in E.A. No. 48 of 2012 in E.P. No. 64 of

2010 in O.S. No. 197 of 2001 passed by the Learned Principal Subordinate Judge at Tiruppur.

2. The Learned Counsel for the Petitioner would submit that the Petitioner is the Second Defendant in O.S. No. 197 of 2001. He would further submit that the Petitioner is the purchaser of the property from the First Defendant in the suit on 20.09.2000 and ever since the date of purchase, he is in exclusive possession of the suit property as absolute owner. While so, the Respondent/Plaintiff filed the O.S. No. 197 of 2001 before the Learned Subordinate Judge, Tiruppur against the vendor of the Petitioner and the Petitioner seeking to enforce an unregistered sale of agreement dated 12.04.2000. When the Petitioner approached his vendor, who is the First Defendant in the suit, with regard to the suit, the vendor agreed to take care of the suit and thereby, on his advice, the Petitioner engaged one Mr. S.Basuviah, Advocate to appear on behalf of him. The Petitioner was instructed to sign a vakalat and an undertaking was given by the vendor and Mr. S.Basuviah, Advocate that the suit will be contested and taken care of. However, later, he came to know that the vendor himself had committed a calculated fraud and he is the person, who has engaged the Respondent/Plaintiff to file the suit against him. Though the Petitioner had filed the written statement, the vendor did not

chose to file the written statement and he had been set exparte. The Petitioner also understands that earlier the suit was dismissed for default on 09.03.2006 and the Petitioner was not informed about the same. He would further submit that subsequently, Mr. S.Basuviah, Advocate has lost his entire family in a road accident on 31.05.2008 and after that unfortunate occurrence, Mr. S.Basuviah had also restrained himself from appearing before Courts and that he has also not maintained the case bundles properly. He would further submit that later, the suit had been restored and transferred to the file of the Learned First Additional Sub Court, Tiruppur and the case has been listed for trial on 02.06.2009, wherein the Petitioner was set exparte on 15.06.2009 as the Counsel had reported no instructions and an exparte order was passed. He would further submit that the Petitioner was under the strong belief that the suit was dismissed on 09.03.2006 itself. However, the Petitioner was left in dark with regard to the restoration of the suit and the final exparte decree passed against him. Since the Petitioner was under the bonafide belief that the case would be taken care of, he was not following the happenings. Later on an enquiry, he came to know all the unfortunate happenings that had taken place and had immediately taken change of vakalat from Mr. S.Basuviah and thereafter, engaged another Counsel and came to know that the suit had been decreed exparte and thereafter, E.P. No. 64 of 2010 had been filed by the

Respondent for executing the exparte decree and the Petitioner was also set exparte in E.P. No. 64 of 2010 on 16.08.2011 and an exparte order was passed. Immediately coming to know about the execution proceedings, the Petitioner invoking Sub-rule 3 of Rule 105 of Order XXI of the Code of Civil Procedure (as amended by the Madras High Court) filed a petition to set aside the exparte order dated 16.08.2011 in E.P. No. 64 of 2010 along with E.A. No. 48 of 2012 to condone the delay of 166 days in filing the same. He would further submit that there had been a delay of 166 days and he would pray that if the delay of 166 days is not condoned and if the Petitioner is not permitted to contest the execution proceedings, the Petitioner will be put to untold hardship. He would further submit that he has also filed a petition to set aside the exparte order dated 15.06.2009 in O.S. No. 197 of 2001 along with I.A. No. 306 of 2012 to condone the delay of 958 days in filing the same. He would further submit the Petitioner is the interested person and thereby, he would seek to allow the Civil Revision Petition on imposition of costs and terms.

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3. The Learned Counsel for the Respondent would vehemently oppose stating that the Execution Court finding that the Petitioner had been lethargic, had dismissed the petition to condone the delay in setting aside the exparte order. The Execution Court had found that the Petitioner had not shown any

sufficient cause to condone the delay of 166 days and the Petitioner had conveniently invoked Sub-rule 3 of Rule 105 of Order XXI of the Code of Civil Procedure (as amended by the Madras High Court) to file a petition to set aside the exparte order. He would further submit that the exparte order in the suit had been passed on 15.06.2009 and thereafter, E.P. No. 64 of 2010 was filed and in the execution proceedings, the Petitioner was set exparte and an exparte order was passed on 16.08.2011 and thereby, he would vehemently oppose the Civil Revision Petition.

4. Heard the Learned Counsels for both sides and perused the materials placed on record.

5. The petition in E.A. No. 48 of 2012 had been filed to condone the delay of 166 days in filing a petition to set aside the exparte order dated 16.08.2011 in E.P. No. 64 of 2010. The Execution Court not accepting the reasons stated by the Petitioner and further finding that the petition under Sub-rule 3 of Rule 105 of Order XXI of the Code of Civil Procedure (as amended by the Madras High Court) has been filed only to avoid technical hurdles, had dismissed that petition. The Execution Court has also held that the Counsel had filed vakalat in E.P. No. 64 of 2010 on 18.10.2010 and after taking

time for filing counter, waited till 16.08.2011 and only thereafter, had filed the petition to set aside the exparte order. This Court is of the opinion that though there had been some lapses on the side of the Petitioner, there is nothing wrong in the Petitioner invoking Sub-rule (3) of Rule 105 of Order XXI of the Code of Civil Procedure, 1908. Further, this Court in the judgment reported in **(2011) 6 CTC 268 (N.Rajendran Vs. Shriram Chits Tamil Nadu Pvt. Ltd.)** has held that there is no bar for the Petitioner to file a petition under proviso to Sub-rule (3) of Rule 105 of Order XXI, which would now become the proviso to Sub-rule (3) of Rule 106 of Order XXI of the Code of Civil Procedure, 1908 (as amended by the Madras High Court) to condone the delay, and that the suit is also filed for a substantive relief. This Court is of the further opinion that the Petitioner has shown sufficient cause for condoning the delay and if the delay is not condoned and if permission is not granted to the Petitioner, it would put the Petitioner to irreparable loss and hence, this Court deems it fit to allow the Civil Revision Petition with imposition of stringent costs and conditions.

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6. In view of the above, the impugned order dated 26.04.2017 in E.A. No. 48 of 2012 in E.P. No. 64 of 2010 in O.S. No. 197 of 2001 passed by the Learned Principal Subordinate Judge at Tiruppur is hereby set aside and E.A. No. 48 of 2012 to condone the delay in filing the petition to set aside the

exparte decree stands allowed on condition that the Petitioner pays cost of Rs.15,000/- (Rupees Fifteen Thousand Only) to the Respondent within a period of four weeks from the date of receipt a copy of this Order failing which, the order dated 26.04.2017 would stand automatically restored.

7. With the above directions, the Civil Revision Petition stands allowed with costs. Consequently, the connected Miscellaneous Petition is closed.

26.04.2021

vjt

Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order

To

1. The Principal Subordinate Court,
Tiruppur.
2. The First Additional Subordinate Court,
Tiruppur.

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A.D. JAGADISH CHANDIRA, J.

vjt



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