

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)Nos.4742 & 4743 of 2017

1.Gowtham Sampath

2.Nirmala Perumal

Both represented by Power Agent

E.A.Sekar

.. Petitioners in both C.R.Ps.

Vs.

Gurdip Singh Sandhu

.. Respondent in both C.R.Ps.

Prayer in C.R.P.No.4742/2017: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 30.08.2017 made in I.A.No.1017 of 2017 in I.A.No.530 of 2014 in O.S.No.588 of 2007 on the file of the Principal District Court, Kancheepuram District, Chengalpattu.

Prayer in C.R.P.No.4743/2017: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 30.08.2017 made in I.A.No.1019 of 2017 in I.A.No.844 of

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2012 in O.S.No.588 of 2007 on the file of the Principal District Court,
Kancheepuram District, Chengalpattu.

(In both C.R.Ps.)

For Petitioners : Mr.T.V.Ramanujam (Senior Counsel)
for M/s.C.Jagadish

For Respondent : Mr.A.V.Arun

COMMON ORDER

(The matter is heard through 'video conferencing/hybrid mode')

C.R.P.No.4742 of 2017 is filed against the fair and decreetal order dated 30.08.2017 made in I.A.No.1017 of 2017 in I.A.No.530 of 2014 in O.S.No.588 of 2007 on the file of the Principal District Court, Kancheepuram District, Chengalpattu.

C.R.P.No.4743 of 2017 is filed against the fair and decreetal order dated 30.08.2017 made in I.A.No.1019 of 2017 in I.A.No.844 of 2012 in O.S.No.588 of 2007 on the file of the Principal District Court, Kancheepuram District, Chengalpattu.

2.The issues and the parties involved in both the Civil Revision Petitions are one and the same and hence, they are disposed of by this common order.

3.The petitioners are plaintiff in O.S.No.588 of 2007 on the file of the Principal District Court, Kancheepuram District, Chengalpattu. They filed the said suit for specific performance of agreement of sale dated 14.11.2004, against one Major Harbhajan Singh Sandhu. The said defendant remained exparte and exparte decree was passed on 17.04.2008. The petitioners filed E.P.No.28 of 2008 for execution of sale deed and sale deed dated 15.07.2009 was executed by the Court on behalf of the defendant Major Harbhajan Singh Sandhu, which was registered as Document No.2973/2009 at Sub Registrar Office, Thiruporur. The petitioners filed E.P.No.10 of 2012 for delivery of possession of suit property and the same is pending. The respondent herein, son of the defendant, filed 4 applications through his Power Agent viz., Harish G.Dave, in I.A.No.842 of 2012 to recognize Harish

G.Dave, as power agent of the respondent, I.A.No.843 of 2012 to implead the respondent by power agent Harish G.Dave, as party 2nd defendant in the suit, I.A.No.844 of 2012 to condone the delay of 1445 days in filing the application for setting aside the exparte decree passed on 17.04.2008 and unnumbered application to set aside the exparte decree dated 17.04.2008 in the suit. In the said applications filed by the power agent, the petitioners filed counter affidavits, contending that the power agent cannot represent the principals in respect of the events that took place prior to execution of sale deed and application for impleading under Order I Rule 10 (2) of C.P.C., is not maintainable. While so, the counsel for the power agent made endorsement "As the Principal Gurdeep Singh Sandhu has come from Muscat this petition by Power agent is not pressed. May be dismissed" in I.A.Nos. 842 of 2014, filed to recognise Harish G.Dave as power agent and "This petition may be dismissed as not pressed as the principal has filed a petition under Order 22 Rule 3 of C.P.C." in I.A.No.843 of 2014, filed to implead the respondent as party 2nd defendant in the suit. Recording the endorsement, those two I.A.s were dismissed.

4.The respondent filed I.A.No.530 of 2014 to implead himself as party, without filing petition to set aside the exparte decree and application to condone the delay in filing the petition to implead him. I.A.No.844 of 2012, filed to condone the delay and unnumbered I.A., filed to set aside the exparte decree filed by the power agent cannot be continued, as power agent was not recognised. The petitioners further stated that the respondent did not file any vakalat along with I.A.No.530 of 2014. Without authority, the counsel for the respondent has no locus standi to continue I.A.No.844 of 2012 or to proceed with I.A.No.530 of 2014. I.A.No.530 of 2014 filed by the respondent has to be rejected as he has not filed any petition to set aside the exparte decree. The petitioners further submitted that only the defendant can file a petition to set aside the exparte decree under Order IX Rule 13 of C.P.C. The respondent herein is not a person to depose about the exparte decree passed against his father. The respondent filed I.A.No.653 of 2015 to amend the affidavit in I.A.No.844 of 2012, filed to condone the delay in filing the petition to set aside the exparte decree and in unnumbered I.A., filed under Order IX Rule 13 of C.P.C., by his power agent, to substitute his

name in the affidavit. The petitioners filed counter affidavit and opposed the said application. The learned Judge passed an order, permitting to amend the cause title alone and hence, I.A.No.844 of 2012 originally filed by the respondent's power agent cannot be continued by him, as petitions filed to recognize the power agent and to implead the respondent as party under Order I Rule 10 (2) of C.P.C., through his power agent was dismissed as not pressed. On these averments, the petitioners filed I.A.Nos.1017 of 2017 and 1019 of 2017, to reject I.A.No.530 of 2014 and I.A.No.844 of 2012 respectively as not maintainable. The petitioners further stated that object of Order VII Rule 11 of C.P.C. is to prevent frivolous case and also to defend the vexatious litigations unnecessarily. These two I.A.s are abuse of process of law. If applications are not rejected, the petitioners will be put to irreparable loss and hardship and prayed for rejection of I.A.Nos.530 of 2014 and 844 of 2012 and allowing both the Civil Revision Petitions.

5.The respondent filed counter affidavit and submitted that the petition under Order VII Rule 11 of C.P.C. to reject the application is not

maintainable. The present petitions are misconceived. None of the provisions of Order VII Rule 11 applies to the petitions filed by the petitioners. The provisions of Order VII Rule 11 of C.P.C. applies only for rejection of plaint and not to reject the application. The application under Order VII Rule 11 of C.P.C. can be filed only where there is abuse of process of Court. In the suit, the suit summon was not served on the defendant. The defendant was suffering from fever and after death of his wife, he left the residence at Besant Nagar and went to Muscat to live with his son, the respondent herein. The petitioners knowing fully well that the defendant left Besant Nagar address, filed suit mentioning the said address and obtained exparte decree. The respondent came to know about the exparte decree only on 12.03.2012 and there is no delay in filing the petition to set aside the exparte decree dated 17.04.2008. There is no delay, but by abundant caution, the respondent through his power agent, filed I.A.No.844 of 2012 to condone the delay in filing the petition to set aside the exparte decree. Subsequently, the respondent came to India and decided to prosecute the case himself. Hence, I.A.Nos.842 and 843 of 2012 were dismissed as not pressed. The respondent filed

I.A.No.530 of 2014 under Order XXII Rule 4 and Section 151 of C.P.C., for impleading himself as 2nd defendant. The principal can prosecute the case even without cancelling the power of attorney, as power of attorney is only an agent of respondent/principal. I.A.No.843 of 2012 was filed by the power of attorney under Order I Rule 10 of C.P.C., and when it was brought to the notice of the respondent, the said application was withdrawn as not pressed and present I.A.No.530 of 2014 under Order XXII Rule 4 of C.P.C., filed by the respondent, which is in order, as the legal representative of the defendant, who is the son of the defendant is entitled to implead him as 2nd defendant in the suit. I.A.No.844 of 2012 was amended and the respondent is entitled to proceed with the said application. In application I.A.No.530 of 2014, originally vakalat of respondent was not filed. The Court numbered the I.A. without noticing the defects. When the defect came to be noticed, the same was rectified by filing vakalat. Once the defect is rectified, the application cannot be rejected. The contention of the petitioners that only the party to the suit can file an application to set aside the exparte decree is not correct. When a defendant dies after exparte decree, the legal representatives of the

defendant are entitled to file an application to set aside the exparte decree. The respondent is not a third party, but he is son of the deceased defendant and he is entitled to file an application to set aside the exparte decree. The present two applications filed by the petitioners are vexatious and filed only to protract the proceedings and prayed for dismissal of both the applications. The learned Judge, considering the entire materials and pleadings, dismissed both the I.As.

6. Against the said order dated 30.08.2017 made in I.A.No.1017 of 2017 in I.A.No.530 of 2014 in O.S.No.588 of 2007 and I.A.No.1019 of 2017 in I.A.No.844 of 2012 in O.S.No.588 of 2007, the petitioners have come out with the present Civil Revision Petitions.

7. The learned Senior Counsel appearing for the petitioners contended that the learned Judge failed to consider that as per Order III Rule 4 of C.P.C., no pleader can act for any person, unless he has been appointed for the purpose for such person by a document in writing. The learned Senior Counsel submitted that I.A.No.844 of 2012 filed by the

respondent is not maintainable, as he is not a party to the suit. The defendant did not file any petition to set aside the exparte decree during his life time. The learned Judge failed to properly appreciate Order IX Rule 13 of C.P.C., which clearly says that only a party to the suit can file an application to set aside the exparte decree. The learned Judge failed to consider the judgments in **2013 (3) CTC 356 [Ram Prakash Agarwal and another v. Gopi Krishan and others]** and **2013 (5) CTC 640 [C.Venkatesan Vs. R. Natarajan]**, relied on by the learned counsel for the petitioners and erroneously dismissed the applications. When the counsel for the power agent made endorsement on the applications in I.A.Nos.842 and 843 of 2012 as not pressed, since the principal himself is prosecuting the case, the learned Judge failed to see that application in I.A.No.844 of 2012 filed by power agent is not maintainable. The respondent filed only application to amend I.A.No.844 of 2012 and unnumbered application to set aside the exparte decree. But he has not filed any application for impleading, under Order XXII Rule 3 of C.P.C. The learned Judge failed to consider the maintainability of the application in I.A.No.844 of 2012, filed by third party, but considered

only non-filing of vakalat by the respondent. The learned Judge failed to see that respondent did not even file vakalat in application in I.A.No.844 of 2012, which was filed earlier through his power agent. Even in I.A.No.530 of 2014 filed under Order XXII of C.P.C., the respondent has not filed vakalat. I.A.No.844 of 2012 filed by the power agent of the respondent cannot survive even after amendment. The original defendant, Major Harbhajan Singh Sandhu died, leaving behind the respondent and one daughter by name Sukhwant Nimhas as his legal heirs. Since all the legal representative of Major Harbhajan Singh Sandhu/defendant are not impleaded, I.A.No.530 of 2014 is defective one. The learned Judge ought to have considered the above materials and rejected both the applications in I.A.Nos.530 of 2014 and 844 of 2012 and prayed for allowing both the Civil Revision Petitions.

8.The learned counsel appearing for the respondent submitted that initially, the applications were filed through power of attorney to implead the respondent as 2nd defendant and to condone the delay in filing the application to set aside the exparte decree. Subsequently, the respondent

came from Muscat and decided to prosecute the case himself and applications in I.A.No.842 of 2012, to recognise the power agent and I.A.No.843 of 2012, to implead the respondent herein through power agent, were not pressed. The respondent himself filed I.A.No.530 of 2014 under Order XXII Rule 3 of C.P.C., to implead him as party to the suit and filed I.A.No.653 of 2015 to amend the application in I.A.No.844 of 2012 and unnumbered application to set aside the exparte decree. The application filed by the respondent for amendment was ordered and in view of the same, I.A.No.844 of 2012 is maintainable. As far as I.A.No.530 of 2014 is concerned, the same was filed with a defect of not filing vakalat. When the defect was found out, the same was rectified by the respondent. The defect was only procedural and therefore, it will not affect the substantial right of the respondent and said defect also is now rectified. The learned Judge has considered all the materials and has given valid reason for dismissing both the applications and prayed for dismissal of the Civil Revision Petitions.

9.Heard the learned Senior Counsel appearing for the petitioners as well as the learned counsel appearing for the respondent and perused the entire materials available on record.

10.From the materials on record, it is seen that the petitioners have filed suit for specific performance of agreement of sale against the father of the respondent and the said suit was decreed against the father of the respondent, by an exparte decree dated 17.04.2008. The petitioners also filed E.P.No.28 of 2008 and got the sale deed executed in their favour. While the proceedings in the E.P.No.10 of 2012 for taking possession of the property was pending, the defendant died. The respondent, who is son of the deceased defendant, filed 4 applications through his Power Agent viz., Harish G.Dave, to recognize Harish G.Dave, as power agent of the respondent, to implead the respondent by power agent Harish G.Dave, as party 2nd defendant in the suit and to condone the delay of 1445 days in filing the application for setting aside the exparte decree passed on 17.04.2008. The said applications were numbered as I.A.Nos.842 to 844 of 2012 and application filed to set aside the exparte decree dated

17.04.2008 was unnumbered. While the applications were pending, the respondent who came down from Muscat, decided to prosecute the proceedings himself. In view of the same, the counsel for the power of agent made endorsement in I.A.Nos.842 and 843 of 2012, that those applications are not pressed, as respondent himself will be filing application under Order XXII Rule 3 of C.P.C. to get himself impleaded as party defendant. In view of such endorsement, those applications were dismissed as withdrawn. After such order of dismissal, the respondent filed I.A.No.530 of 2014 under Order XXII Rule 3 of C.P.C. to implead him as 2nd defendant in the suit. While filing the said application, the respondent did not file vakalat along with the said application. The Court, without properly verifying the said application and without returning the application for not filing vakalat, numbered the application as I.A.No.530 of 2014. When the said defect was found out, as per order of the Court, the respondent filed vakalat and the same was taken on file.

11.It is the contention of the learned Senior Counsel appearing for the petitioners that as per Order III Rule 4 of C.P.C., unless the party

appoints pleader by a document in writing, the pleader cannot appear on behalf of the respondent and application is to be rejected as per Order VII rule 11 (d) of C.P.C. The said contention is not acceptable in view of Order IV of C.P.C. As per Order IV Rule 1(2) of C.P.C., every application must be applied with rule contained in Orders VI and VII of C.P.C., so far as they are applicable. As per Section 141, the procedure provided in C.P.C. with regard to suits shall be followed as far as it can be made applicable in all the proceedings in any Court of civil jurisdiction. In view of Section 141 of C.P.C., both Order III and Order IV C.P.C., are applicable to present applications. When a plaint or application is filed without complying the requirement contained in Orders VI and VII of C.P.C., the same will not automatically result in rejection or dismissal. An opportunity must be given to the party to rectify the mistake and when the defect is rectified, the plaint or application is deemed to be properly instituted. The procedural defects not going to root of the matter should not be permitted to defeat the cause of justice and dismissal on mere technicalities is not proper. In the present case, when the respondent filed application to implead himself as 2nd defendant, the same was not

properly presented, i.e., vakalat was not filed along with the application. The Court ought to have returned the application, directing the respondent to rectify the defect. Without doing so, the Court, by mistake numbered the application. After the defect was found out, the same was rectified. In view of the same, I.A.No.530 of 2014 cannot be rejected as per the provisions of Order VII Rule 11 (d) of C.P.C. The application has to be considered on merits and order is to be passed in accordance with law. There is no error in the reasoning of the learned Judge, dismissing I.A.No.1017 of 2017, warranting interference by this Court.

12.For the above reason, the C.R.P.No.4742 of 2017 is liable to be dismissed and is hereby dismissed.

13.As far as C.R.P.No.4743 of 2017 is concerned, it relates to I.A.No.844 of 2012, filed by the power agent, to condone the delay in filing the petition to set aside the exparte decree. When the respondent decided to prosecute the matter himself, the application filed by the power agent to recognise him as power agent of the respondent was

dismissed as not pressed. Once the power agent was not recognized as agent of respondent, the application filed by the power agent of respondent is not maintainable. In the present case, after I.A.No.842 of 2012 to recognize the power of attorney as agent of the respondent was dismissed, the application in I.A.No.844 of 2012 filed to condone the delay in filing the application to set aside the exparte decree also ought to have been dismissed. The respondent filed application to amend I.A.No.844 of 2012. The learned Judge allowed the application only with regard to amendment of cause title and the affidavit filed by the power agent in the application was not modified. In view of the same, the said application cannot be proceeded with by the respondent based on the affidavit filed by the power of agent. The learned Judge failed to consider that Harish G.Dave, the power agent is no longer power agent of respondent and affidavit filed by the power agent cannot be acted upon. In view of the same, the impugned order of the learned Judge made in I.A.No.1019 of 2017 is set aside. I.A.No.1019 of 2017 is allowed and I.A.No.844 of 2012 is rejected. The learned Judge is directed to return the unnumbered application filed to set aside the exparte decree by power

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agent. It is open to the respondent to file fresh application to set aside the exparte decree along with application to condone the delay in filing the petition to set aside the exparte decree and satisfy the Court that delay is not wilful and it has to be condoned. The learned Judge is directed to consider the same in accordance with law, if such an application is filed.

With the above directions, C.R.P.No.4743 of 2017 is allowed. No costs.

Index :: Yes/No
gsa

To

The Principal District Judge,
Kancheepuram,
Chengalpet.

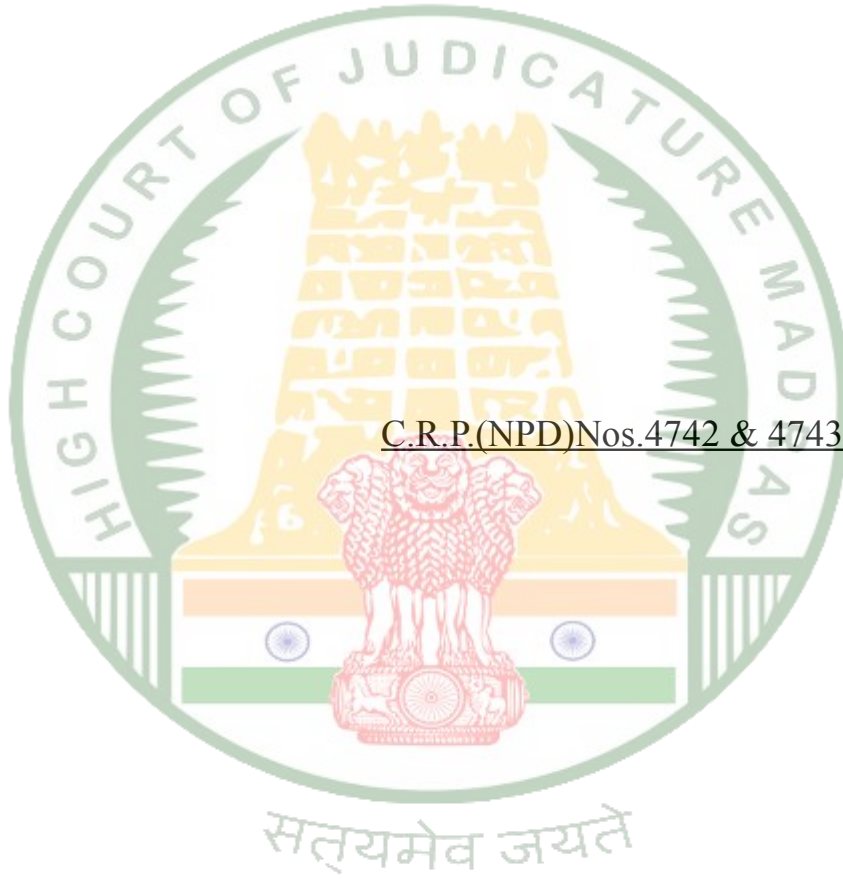
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