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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.07.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

C.R.P.No.3320 of 2018
and C.M.P.No.18850 of 2018

K.M.Gopal

... Petitioner

Vs

1.Sri Moogambigai Financiers,
Represented by Managing Partner,
Parameswari, Wife of R.G.N.Palanisamy,
Residing at Congress House Road,
Pudupet, Gudiyatham, Vellore District.

2.S.Selvaraj

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, challenging the Order and Decreetal Order dated 03.02.2018 in C.M.A.No.2 of 2016 on the file of the Court of Principal District Judge, Vellore, Vellore District.

For Petitioner : Mr.V.Raghavachari

For Respondents: Mr.T.Dhanyakumar for R1
Mr.M.Sriram for R2

O R D E R

This Civil Revision Petition is filed challenging the Order and Decreetal Order dated 03.02.2018 in C.M.A.No.2 of 2016 on the file of the Court of Principal District Judge, Vellore, Vellore District, thereby dismissing the Civil Miscellaneous Appeal to restore the application challenging the auction sale.

2. The petitioner herein is the third defendant and the first respondent herein is the plaintiff in O.S.No.160 of 1999 on the file of Sub Judge, Gudiyattam, Vellore District. The first respondent herein filed the said suit for recovery of money and the same was decreed on 29.01.2002. Pursuant of the decree, the first respondent herein filed an Execution Petition in E.P.No.75 of 2004 and the same was ordered. In pursuant to the order,



auction was conducted in respect of the immovable property on 06.09.2006. On 21.09.2006 the petitioner herein filed an application in E.A.No.108 of 2006 to set aside the Auction Sale. In that said application the petitioner herein was examined and thereafter he was not present for cross examination. Hence, the same was dismissed for default on 30.04.2014.

3. Again the petitioner herein filed an application in E.A.No.101 of 2014 seeking to condone the delay of 164 days and to set aside the order dated 30.04.2014 in E.A.No.108 of 2006. The said application was also dismissed and aggrieved by the same the Civil Miscellaneous Appeal was filed before the Principal District Judge, Vellore and it was dismissed by the impugned order. As against that, the Civil Revision Petition filed.

4. The learned counsel for the petitioner herein would submit that the exparte Judgment is not in consonance with the Order XX Rule 4 of the CPC. The property was auctioned for very low rate. Therefore, the petitioner herein filed an application to set aside the auction sale. Unfortunately, pending the application, he suffered from cancer and was admitted in the various hospitals. Therefore, there was a delay of 164 days in filing the application to set aside the dismissal order dated 30.04.2014.

5. He further submitted that the petitioner herein was examined as P.W.1 and marked Ex.P1 to Ex.P18. Even then the Court below dismissed the condone delay application for reason the petitioner did not state sufficient reasons of the condone delay application.

6. The learned counsel for the first respondent herein would submit that the auction sale was conducted in respect of the immovable properties on 06.09.2006. Challenging the same, the petitioner herein filed application on 21.09.2006. The said application was pending till 30.04.2014 and on that date it was dismissed for default. The petitioner herein prolonged the proceedings for 8 years and thereafter with the delay of 164 days filed the application to set aside the dismissal order dated 30.04.2014. The said application was filed under Order XXI Rule 105(3) of the CPC read with Section 151 of the CPC. The application itself is not maintainable, since there is no provision in the CPC to condone the delay in Execution Petition much less under Order XXI Rules 105 and 106 of the CPC.

7. As per Order XXI Rule 105 and 106 of the CPC, the application should be filed within 30 days. There is no question of filing the application to condone the delay. That apart, when the reasons stated by the petitioner herein are not sufficient to condone the delay and the Court below rightly dismissed the application. Thereafter the sale was confirmed, delivery of possession was ordered, the delivery also effected on 07.01.2020 and the Execution Petition was terminated on 10.01.2020.



8. Heard Mr.V.Raghavachari, learned counsel appearing for the petitioner herein and Mr.T.Dhanyakumar, learned counsel appearing for the first respondent herein and Mr.M.Sriram, learned counsel appearing for the second respondent herein.

9. The Petitioner herein is the Judgment Debtor in Execution Petition and the suit filed by the first respondent herein for recovery of money. It was decreed by the Judgment and Decree dated 29.01.2002 and on the strength of the decree, the first respondent herein filed an Execution Petition, in which, the auction sale was ordered. Accordingly, on 06.09.2006, the auction sale was conducted and the same was challenged by the petitioner herein in E.A.No.108 of 2006 on 21.09.2006. It was pending for the past 8 years and the same was dismissed on 30.04.2014.

10. After completion of oral evidence when the matter was posted for arguments, the petitioner filed the present application seeking appointment of an Advocate Commissioner. Thereafter, the petitioner failed to appear before the Court below and the same was dismissed for default. Therefore, the petitioner filed an application to restore the said application with the delay of 164 days under Order XXI Rule 105(3) of the CPC and Section 151 of the CPC.

11. A perusal of the affidavit filed in support of the present application revealed that the petitioner herein was suffering from Carcinoma Left Vocal Cord disease and he underwent radio therapy. He was taking continuous treatment in the Appolo Hospital, Chennai and Dr.Agarwal's Eye Hospital, Chennai. Therefore, he could not contact his counsel. In support of his contentions, he marked Ex.P1 to P18.

12. It is seen that the application challenging the auction sale was pending from 21.09.2006 to 30.04.2014. When the application was posted for arguments, the petitioner filed an application seeking appointment of an Advocate Commissioner. At that juncture, the petitioner failed to proceed with the application and as such the said application was dismissed on 30.04.2014.

13. As rightly pointed out by the learned counsel for the first respondent, the dismissal coming under Order XXI Rule 105 (2) of the CPC, it reads as follows:

"105(2). Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed."



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14. Accordingly, when the application was posted for hearing, the petitioner herein did not appear when the case was called on and the Executing Court dismissed the application on 30.04.2014. When the application was dismissed for default, as per Order XXI Rule 106 of the CPC, the application to set aside shall be filed within 30 days from the date of the order.

15. In this regard, the learned counsel for the first respondent relied upon the Judgment reported in (2005) 7 SCC 300 Damodaran Pillai and others -vs- South Indian Bank Ltd wherein it has been held as follows:

"16. An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order XXI of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the Court cannot be invoked."

16. The Hon'ble Supreme Court of India held that an application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the CPC. There is a statutory bar in applying the provisions Section 5 of the Limitation Act. Therefore, the petitioner filed an application under Order XXI Rule 105(3) of the CPC. Rule 105(3) is not applicable to the petitioner, since the 105(3) read as follows:

"105(3). Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application exparte and pass such order as it thinks fit.

Explanation: An application referred to in sub-rule(1) includes a claim or objection made under rule 58."

17. Where the applicant appears and the opposite party fails to appear, the Court may hear the application exparte. The petitioner / applicant fails to appear on that date of hearing. Therefore, Order XXI Rule 105(2) of the CPC is applicable to the petitioner and the petitioner has to be filed within 30 days. Therefore, the application filed under Order XXI Rule 105(3) is not maintainable. The Court below rightly dismissed the Civil Miscellaneous Appeal and this Court finds no infirmity or illegality in the order passed by the Court below.



18. Therefore, after confirmation of the auction sale, the delivery of possession ordered and accordingly the first respondent herein had effected possession and Execution Petition also terminated. That apart, Execution Petition itself has now been terminated after effecting delivery.

19. Accordingly, this Civil Revision Petition is dismissed. Consequently, the connected miscellaneous petition is dismissed. No order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

rna

To

The Principal District Judge,
Vellore, Vellore District.

+1cc to V.Raghavachari, Advocate (SR No.33408)

+1cc to M.Sriram, Advocate (SR No.33639)

C.R.P.No.3320 of 2018
and C.M.P.No.18850 of 2018

RSV (CO)
PR (04/08/2021)