



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON	20.09.2021
DELIVERED ON	07.10.2021

CORAM :

THE HONOURABLE MRS.JUSTICE S.ANANTHI

C.M.A. (MD) .Nos.345 & 346 of 2019

and

C.M.P. (MD)No.4298 of 2019

WEB COPY

1.Sardar Batcha

2.Jagitha Begum

... Appellants/Petitioners/Plaintiffs
in both CMAs.

Vs.

1.Syed Abuthahir

2.The Branch Manager,
Repco Home Finance Limited,
Gokale Road, Chinnachokkikulam,
Madurai - 2

... Respondents/Respondents/Defendants
in both CMAs.

COMMON PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(r) and r/w 96 of Civil Procedure Code, to set aside the fair and decreetal order dated 04.03.2019 in I.A.Nos.381 & 382 of 2018 in O.S.No.17 of 2016 on the file of the learned I Additional District Judge, Madurai and allow this appeal.

In both C.M.As.

For Appellants	: Mr.G.Prabhu Rajadurai, for Mr.M.Mohammed Rafi
For R-1	: Mr.R.Murali, for Mr.S.Premkumar

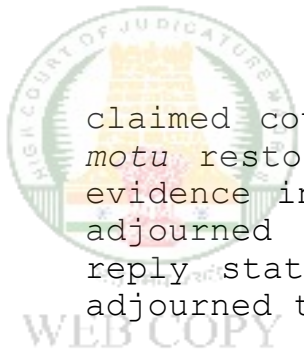
COMMON ORDER

These Civil Miscellaneous Appeals have been filed to set aside the fair and decreetal order, dated 04.03.2019 in I.A.Nos.381 & 382 of 2018 in O.S.No.17 of 2016 passed by the learned I Additional District Judge, Madurai.

2.Heard Mr.G.Prabhu Rajadurai, learned counsel appearing for the appellants and Mr.R.Murali, for Mr.S.Premkumar, learned counsel appearing for R-1. Perused the documents.

3.The appellants/plaintiffs have filed a suit in O.S.No.17 of 2016 for partition of 3/6th share in the suit property. The respondents herein/defendants have filed their written statement with counter claim for recovery of possession of suit property and also for mesne profits and Court fees also paid.

4.The said suit in O.S.No.17 of 2016 was dismissed for default on 03.10.2018. Thereafter, it was noticed that the defendants have



claimed counter claim. Therefore, on 06.10.2018 the Court has *suo motu* restored the case and posted to 31.10.2018 for recording of evidence in counter claim. On that day, at request, the case was adjourned to 08.11.2018 and the Court noticed that there was no reply statement filed on the counter claim. Thereafter, it was adjourned to 16.11.2018 for Judgment.

5. On 16.11.2018, the learned I Additional District Judge has pronounced the Judgment in counter claim.

6. On 14.12.2018, the plaintiffs have filed a restoration petition in I.A.No.381 of 2018 and the same was dismissed on 04.03.2019 on the basis of barred by limitation since the petition was filed after 42 days from the date of limitation.

7. The Court *suo motu* restored the case and passed Judgment in counter claim. No notice was served to the plaintiffs when it was restored to file.

8. When the suit was restored on file the order of dismissal for non-appearance of the plaintiffs goes. If the Court has passed an *exparte* order in the counter claim on the date of dismissal of suit, issuing of notice to the plaintiffs is not necessary.

9. But the Court *suo motu* restored the suit and posted for evidence in the counter claim. In the counter claim, no witnesses were examined and no documents were marked.

10. When the Court deciding the counter claim on merits then it should be given an opportunity to the plaintiffs to contest the counter claim. Without marking of documents, the Court below has delivered the judgment in the counter claim. Regarding counter claim, the plaintiffs were not set *exparte*.

11. The suit in O.S.No.17 of 2016 was filed for recovery of possession. It is stated in the written statement that the defendants have admitted that the right of $\frac{1}{2}$ share in the land without decoding the shares the Court cannot deliver the Judgment in counter claim that to for recovery of possession.

12. Even reply statement not filed by the plaintiffs for counter claim the Court can verify the pleadings with plaint averments.

13. Judgment on counter claim delivered on 16.11.2018.

14. The relevant portion of the paragraph No.8 of the Judgment reported in **2016 SCC Online Mad 12876, C.Arumugam Vs. Ashok Kumar**, is extracted hereunder:

.....

"Merely due to non appearance of the



defendant in the suit, the trial Court should not pass non speaking order, but the Court must have gone through the facts and circumstances of the case of the either parties while deciding the suit, the speaking orders should be passed. Time and again, this Court and the Hon'ble Apex Court very categorically held that the Court below should pass the orders on merits by giving speaking order in all the cases either it is contested or exparte proceedings. The case in hand, though it was exparte decree, but it is only a non speaking order".

15.Without marking documents the Court cannot consider the merits of documents that without knowledge of the other side. The Court must set exparte in the counter claim when the suit was dismissed for default. After restoring the suit for consideration of counter claim, notice should be issued to the plaintiffs.

16.The Court below has to examine the witness and marked documents. After considering the averments in the plaint, the Judgment in counter claim should be passed.

17.Further, the suit was also *suo motu* restored by the Court below. Therefore, the date counts when final order was passed in the counter claim i.e., from 16.11.2018.

18.Therefore, both the petitions in I.A.Nos.381 & 382 of 2018 in O.S.No.17 of 2016 were filed within the limitation period. Hence, this Court is inclined to set aside the order, dated 04.03.2019 in I.A.Nos.381 & 382 of 2018 in O.S.No.17 of 2016 passed by the learned I Additional District Judge, Madurai.

19.Finally, these Civil Miscellaneous Appeals are allowed by setting aside the fair and decreetal order, dated 04.03.2019 in I.A.Nos.381 & 382 of 2018 in O.S.No.17 of 2016 passed by the learned I Additional District Judge, Madurai. The learned I Additional District Judge, Madurai, is directed to take the original suit with counter claim and dispose the matter on merits and in accordance with law. No Costs. Consequently, connected miscellaneous petitions are closed.

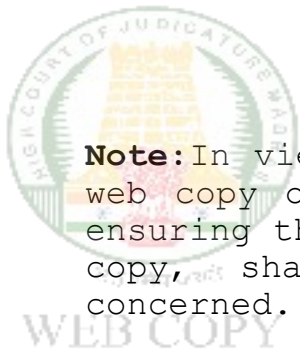
Sd/-

Assistant Registrar (CS III)

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/ /2021

Sub Assistant Registrar(CS)



Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

The I Additional District Court,
Madurai.

Copy to:

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+2 CC to M/s.G.PRABHU RAJADURAI, Advocate (SR-31795 & SR-31794
dated 08/10/2021)

Common Order made in
C.M.A. (MD) .Nos.345 & 346 of 2019
07.10.2021

PK(CO)/RS (25.10.2021) 4P 6C