



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.12.2021

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THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P(MD)Nos.410 and 411 of 2017

and

C.M.P(MD)Nos.2062 and 2063 of 2017

C.R.P(MD)No.410 of 2017

1.K.Maheshwari
2.S.Krishnamoorthy

... Petitioners/3rd Party/
Defendants 10 & 11

Vs.

1.Mubarak Ali

... 1st Respondent/Petitioner/
4th Defendant

2.A.Shamshath Begum

... 2nd Respondent/Respondent/
Plaintiff

PRAYER:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 23.01.2017 passed by the learned II Additional Subordinate Judge, Tiruchirappalli, in I.A.No.88 of 2017 in O.S.No.51 of 2011.

For Petitioners : Mr.K.K.Senthil, Advocate
For R1 : Mr.M.S.Balasubramania Iyer, Advocate
For R2 : No appearance

C.R.P(MD)No.411 of 2017

1.R.Sukumar
2.S.Jeyanthi
3.R.Chandrasekar
4.R.Jeyakumar

... Petitioners/3rd Parties/
Defendants 12 to 15

Vs.

1.Mubarak Ali

...1st Respondent/Petitioner/
4th Defendant

2.A.Shamshath Begum

...2nd Respondent/Respondent/
Plaintiff

PRAYER:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 23.01.2017 passed by the learned II Additional Subordinate Judge, Tiruchirappalli, in I.A.No.88 of 2017 in O.S.No.51 of 2011.



For Petitioners : Mr.J.Barathan, Advocate

For Respondent : No appearance

COMMON ORDER

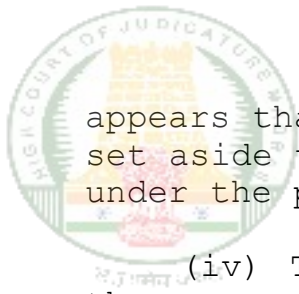
These civil revision petitions are filed by the defendants 10 to 15 in O.S.No.51 of 2012 on the file of the Second Additional Subordinate Court, Trichy. CRP(MD) No.410 of 2017 is filed by the defendants 10 and 11 whereas CRP(MD) No.411 of 2017 has been filed by the defendants 12 to 15. The revision petitioners in both the civil revision petitions seek to challenge the order passed in I.A.No.88 of 2017.

2.The facts in brief are as follows:-

(i) The second respondent herein namely A.Shamshath Begum had filed the suit O.S.No.51 of 2011 for a relief of declaration that the deed of cancellation of the sale deed dated 11.11.2002 is void and for a permanent injunction restraining the defendants 10 to 15 from putting up the construction in the suit property and for a mandatory injunction restraining the defendants 16 and 17 from releasing the sale deed dated 13.12.1998 either in favour of the defendants 1 to 15 or anyone claiming under them and to pass a decree for partition dividing the suit property by metes and bounds into 8 shares out of 7/8 shares and allotting 7/96 shares with separate possession to the plaintiffs. The suit was filed in the year 2011.

(ii) The plaintiff's case is that the property belongs to her father Abdul Rahim who is the husband of defendants 1 and 2 and the father of the plaintiff and defendants 3 to 9. The defendants 3, 4 and 7 were born to Abdul Rahim through the first defendant and defendants 5, 6, 8 and 9 and plaintiff were born to Abdul Rahim through second defendant. The Abdul Rahim had purchased the property from one Adaikalaraj on 13.04.1988. After the purchase of the suit property her father has been in enjoyment of the same exercising his rights as an absolute owner. He had mortgaged the property to the Park Town Benefit Fund Ltd., After the death of her father, her brothers led the plaintiff to believe that they were executing a partition deed and trusting their words she has signed on the dotted lines. It is only three months back the plaintiff had come to know truth that the defendants have created a Hiba in favour of the sixth defendant. That apart the fourth defendant and the third defendant had colluded to get the deed of cancellation of sale deed, which had been executed in favour of their father Abdul Rahim. Further, the defendants 10 to 15 have purchased the suit property from the vendors of the deceased Abdul Rahim. Therefore, the above suit has been filed by the plaintiff.

(iii) It appears that some of the defendants had filed their written statement however, the fourth defendant had remained ~~ex parte~~ and an ex parte order was passed against him. While so, it



appears that the fourth defendant had filed the impugned petition to set aside the *ex parte* order against him by filing I.A No.88 of 2017 under the provisions of Order 9 Rule 7 and Section 151 of CPC.

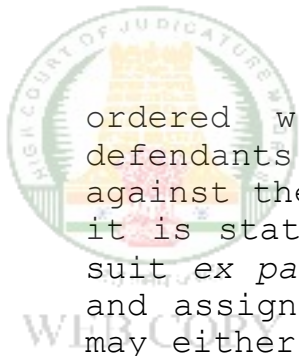
(iv) The fourth defendant had only impleaded the plaintiff as the respondent in this application and no notice of this application had been served on the other defendants. The plaintiff had endorsed no objection to the said petition and by order dated 23.01.2017, the application was allowed and the written statement filed along with the application was taken on file. It is challenging this order that the petitioners are before this court.

3.The learned counsel for the revision petitioners would submit that the learned Judge has totally overlooked the provision of Article 137 of the Limitation Act as well as Rules 29 and 31 of Civil Rules of Practice. Apart from not following procedure contemplated under Order 9 Rule 7 of CPC, the learned counsel would submit that a mere perusal of the written statement now filed by the fourth defendant would clearly demonstrate that the fourth defendant is colluding with the plaintiff. They would submit that after keeping quiet for six years the first respondent has come forward with the impugned application. He would rely on the judgment reported in **2008 4 CTC 162** in the case of **Thangavel Pillai Vs Periyasamy Udayar**, in which this Court was considering the issue of notice in the proceedings under the provision of Order 9 Rule 4 and 9 of CPC. He would also draw the attention of this Court to Rule 31 of the Civil Rules of Practice, which clearly provides that where an interlocutory application has been filed, notice of the same shall be issued to all parties in a suit. He would contend that in the instant case, such notice has not been given and the other defendants have not been made as parties to the proceedings.

4.Mr.M.S.Balasubramania Iyer, learned counsel appearing for the first respondent in C.R.P(MD) No.410 of 2017 would submit that the provisions of Order 9 Rule 11 CPC clearly provides that when there are more than one defendant and one of them does not appear, he has the time till the pronouncement of the judgment to appear and show cause. He would further argue that the question of setting aside an *ex parte* order is purely between the plaintiff and the defendants and the other defendants have nothing to do with said application. However, once the order is set aside and the written statement is filed by the said defendant, the others could file an additional written statement. He would therefore submit that the order passed by the learned Judge is in order and does not require reconsideration.

5.Heard the learned counsel on either side and perused the records.

6.The only bone of contention in the above civil revision petition is that the other defendants have been kept in the dark about this interlocutory application and the application has been



ordered without notice to the revision petitioner and other defendants. The provision for setting aside the *ex parte* order against the defendants is provided under Order 9 Rule 7 CPC, wherein it is stated that where the Court has adjourned the hearing of the suit *ex parte* and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance. The Court may either permit him to appear or put him on terms and fix a date for his appearance. The provision does not make any mention about the defendant not appearing for several hearings after being set *ex parte* and filing an appeal to set aside the *ex parte* order.

7.The learned counsel appearing on the side of the plaintiff would invoke the provision of Order 9 Rule 11 of CPC to state that till the date of the pronouncement of the judgment, the defendant, who has been set *ex parte*, can seek to have the *ex parte* order set aside. The provisions of Order 9 Rule 11 CPC is herein below extracted:-

"11.Procedure in case of non-attendance of one or more of several plaintiffs:- Where there are more plaintiffs than one, and one or more of them appear, and the others to not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit."

8.A reading of Order 9 Rule 11 which is extracted herein above, does not make out such an interpretation. The provision of Order 9 Rule 11, when read along with the provision of Order 9 Rule 10 which relates to the procedure in case of the non-attendance of one or more plaintiffs, would show the clear distinction. In the case of the procedure for the non-attendance by one or more plaintiffs, the Code of Civil Procedure provides that the Court may, at the instance of the plaintiffs appearing, permit the suit to proceed in the same way, as if all the plaintiffs had appeared, or make such order as it thinks fit. However, a similar language is not provided for in Order 9 Rule 11. On the contrary, the provision would indicate that where one or more defendants do not appear, the suit shall proceed and at the time of pronouncing judgment the Court is free to make such order as it deems fit with regard to the defendant, who had remained *ex parte*. When a defendant does not appear on the appointed date, Order 9 Rule 7 clearly provides that he shall be set *ex parte*.

9.Coming to the provision of Rule 31 of the Civil Rules of Practice and the same reads as follows:-

31.Notice:-

(1) Unless the court otherwise orders, notice of an interlocutory application shall be given to the other parties to the suit or matter or proceeding or their pleader not less than three days before the day appointed for the hearing of the application.



(2) Such notice shall be served on the pleader, whenever the party appears by such pleader;

(3) Notice of the application may be served on a party not appearing by pleader by registered post, acknowledgement prepaid, to the address given in the pleading and in the event of its non-service on the party or the party not appearing on the day fixed in the notice, the Court may direct that the notice shall be delivered or sent to the proper officer to be served by him or by one of his subordinate on the party. If the party be absent or refused to receive the notice, the procedure prescribed in rule 15 or 17 or Order V of the Code, as the case may be shall be followed.

A reading of the said rule clearly indicates that notice has to be issued to all the parties in a suit in the case of an interlocutory application. However, such notice can be dispensed with provided the Court gives reasons for the same which is clearly evident from the words "unless the Court otherwise orders". Admittedly, in the instant case, neither has the fourth defendant impleaded all the defendants nor has the Court issued notice to other defendants. Therefore, this order is in violation of the Rules.

10. Therefore, these Civil Revision Petitions are allowed and the order dated 23.01.2017 passed in I.A.No.88 of 2017 is set aside and the matter is remitted back to the learned Second Additional Subordinate Judge, Thiruchirapalli, who shall direct the petitioners to issue notice to all the parties and hear the parties and thereafter pass orders. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

To :-

The II Additional Subordinate Judge, Tiruchirappalli.

COPY TO:

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

+1 cc to Mr.K.K.SENTHIL, Advocate, SR.No.39531

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