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C.M.A. No.992 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.M.A. No.992 of 2022

and

C.M.P.No.7360 of 2022

1.B.Parameshwari
D.Udayasekar (deceased)
2.D.Murali

... Appellants

Vs.

1.The Madras Purasawalkam Hindu
Janopakara Sawatha Nidhi Ltd.,
No.168, Vella Street,
Purasawalkam, Chennai-84.

2.Vamana Auctioneers,
Room No.137,
1st Floor, No.17 O.S.Building,
E.K.Guru Street Periamet,
Chennai-3.

3.Lalitha Sukumaran
4.T.G.Sukumaran
5.R.Anathalingam

... Respondents

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1(c) of Code of Civil Procedure, 1908 against the fair and decreetal order dated 28.10.2021 and made in I.A.No.1/2021 in O.S.No.6527/2019 on the file of



C.M.A. No.992 of 2021

XXI Additional City Civil Court, Allikulam.

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For Appellants : Mr.N.A.Nassir Hussain

For Respondents : Mr.V.Ravi
for R5

R1 to R4 - Not ready in notice

J U D G M E N T

The plaintiffs challenging the dismissal of their application for restoring the suit dismissed on 13.08.2021 by the XXI Additional City Civil Court, Allikulam are the appellants before this Court.

2. The brief facts that are to be considered are as follows:

The appellants / plaintiffs had filed suit O.S.No.6527 of 2019 on the file of the XXI Additional City Civil Court, Allikulam for a declaration that the sale deed dated 12.06.2006 executed by the first defendant in favour of the third and fourth defendant as 'null' and 'void' and for an injunction restraining the defendants, their men and agents, servants or any other persons from interfering with the plaintiff's peaceful enjoyment and possession of the suit schedule property and also to permit the plaintiff



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to redeem the mortgage dated 08.04.1986 and paying a sum of Rs.22,91,450/- or such other amounts as the Court may fix. The said suit was filed against the first respondent herein, who had lent the money to one G.D.Ram, the husband of the first appellant and father of the second and third appellants. The second respondent is the auctioneer who was appointed by the first respondent to sell and respondents 3 and 4 are the purchasers of the property in the auction. The plaintiffs have challenged the sale in favour of respondents 3 and 4, stating that no public auction had been held.

3. The suit was originally filed on the file of this Court as C.S.No.769 of 2007. The defendants 1 to 4 were served with notice. The second defendant was ultimately set *exparte* on 29.11.2010. Thereafter, the suit was transferred to the file of VII Additional Judge, City Civil Court, Chennai and re-numbered as O.S.No.6527 of 2019 in the month of October, 2019. Although the second respondent was set *exparte*, without looking into the earlier records, fresh notice was directed to the second defendant and the matter was adjourned to 24.03.2020. Thereafter, on account of the lockdown, the matter was being adjourned. Meanwhile, the suit once again got



transferred to the file of the XXI Additional Judge, City Civil Court, Chennai at Allikulam on 25.01.2021. Once again summons were ordered to the defendants and the plaintiffs / appellants had paid batta and taken steps to serve the second defendant. The notices were returned with the endorsement "no such addressee". The matter was posted for issuance of fresh notice to the second respondent to the correct address through RPAD on 13.08.2021. Though batta had been paid by the appellants on the earlier date, the factum of the payment could not be brought to the notice of the Court. The learned Judge, therefore, dismissed the suit against the second defendant stating that summons had not been served on the second defendant. The appellants herein had immediately filed I.A.No.1 of 2021 to set aside this order dated 28.10.2021 dismissing the suit against the second defendant. Notice was ordered to the correct address and despite the best attempts, they were unable to serve notice on the second defendant, despite the fact that notice had been taken to the present address of the second defendant. Though steps had been taken, since the records had been misplaced by the counsel, he was unable to bring to the notice of this Court that steps had been taken to serve on the second defendant. Therefore, directed to take fresh notice on 07.10.2021 and a conditional order directing



the appellants to pay a cost of Rs.1,000/- to the DLSA was ordered and the matter stood adjourned to 23.10.2021 under the caption 'await notice for R2'.

4. The appellants had complied with the order and memo of compliance was also filed along with the affidavit of service enclosing a returned cover from the second defendant on 23.10.2021. The appellants have requested the Trial Court to permit them to file an application for substituted service. However, the Court did not record the filing of the affidavit of service and on 28.10.2021 dismissed the petition. Therefore, the plaintiff had taken down the impugned I.A.No.1 of 2021 for restoring the suit against the second defendant.

5. An application was filed under Order 9 Rule 9 to set aside the order dated 13.08.2021, in and by which the suit against the second defendant had been dismissed. It is this application I.A.No.1 of 2021 which is the order impugned before this Court. Though the respondents had brought to the notice of the Court that the second defendant had been set exparte, even when the matter was pending before the High Court, the learned Judge



proceeded to dismiss the application. Challenging the said order, the appellants are before this Court.

6. Heard the learned counsels appearing on either side and perused the materials available on record.

7. Considering the fact that the second defendant had been set *exparte*, even when the suit was pending before this Court, on 29.11.2010, subsequent orders directing fresh notice to the second defendant was totally wrong, neither the Court nor the counsels had verified the earlier records. Since the very issue of notice to a party to the proceedings who has already been set *exparte*, was not in accordance with the procedure, the order dismissing the impugned I.A. deserves to be set aside. Therefore, the appeal is allowed. The suit is restored against the second defendant who has already been set *exparte* on 29.11.2010. The learned counsels would submit that the suit is at the stage of Trial.

8. Taking into account the above fact, this Civil Miscellaneous Appeal is allowed directing the learned XXI Additional Judge, City Civil



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Court, Chennai at Allikulam to dispose of the suit within a period of two months from the date of receipt of a copy of this Judgment. No Costs.

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Consequently, the connected Civil Miscellaneous Petition is closed.

04.07.2022

Index : Yes/No
Speaking Order : Yes / No
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To

- 1.The XXI Additional City Civil Court, Allikulam.
- 2.The Section Officer,
VR Section, Madras High Court,
Chennai.



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P.T. ASHA, J,

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