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C.R.P. (NPD) No.1669 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.01.2022

Delivered on : 03.03.2022

CORAM :

THE HONOURABLE MRS. JUSTICE S. KANNAMMAL

C.R.P. (NPD) No.1669 of 2017

and

C.M.P.No.7823 of 2017

Saminathan @ Arulsaminathan

... Revision Petitioner

Vs.

M.K.Tamilselvan

... Respondent

Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order, dated 03.12.2016 in C.M.A.No.5 of 2016 on the file of the I Additional District Court, Erode, confirming the fair and decretal order dated 15.10.2014 made in I.A.No.295 of 2014 in O.S.No.173 of 2011 on the file of the Sub-Court, Perundurai.

For Petitioner : Mr.L.Monish
for Mr.N.Manokaran

For Respondent : Mr.A.Sundaravadhanam



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ORDER

This Civil Revision Petition has been filed against the order, dated 03.12.2016, in C.M.A.No.5 of 2016 on the file of the I Additional District Court, Erode, confirming the fair and decretal order, dated 15.10.2014, made in I.A.No.295 of 2014 in O.S.No.173 of 2011 on the file of the Sub-Court, Perundurai.

2.For the sake of convenience, the petitioner shall hereinafter be referred to as “defendant” and the respondent shall be referred to as “plaintiff”.

3.The facts leading to the filing of the present Civil Revision Petition are as follows :

- The defendant borrowed a sum of Rs.3,50,000/- from the plaintiff on 01.10.2006 and executed a promissory note in favour of the plaintiff to repay the said amount with interest.
- However, the defendant failed to repay the amount.
- After exchange of legal notices, the plaintiff filed the suit for



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recovery of money against the defendant on the strength of the promissory note executed by the defendant.

- The defendant filed his written statement and took a stand that a blank promissory note was executed as security purpose on 23.03.1997 in respect of a different loan obtained from one Chinnappan, who is a partner in Sakthi Finance, Perundurai. After repayment of the chit loan, when the defendant demanded for return of the said pro-note, the said Chinnappan did not return the same and stated that he had to search.
- Thereafter, the defendant remained absent and he was set *ex parte* on 15.02.2013 and an *ex parte* decree came to be passed by the trial Court on 06.03.2013.
- The defendant filed I.A.No.295 of 2014 to set aside the *ex parte* decree dated 06.03.2013. However, the said application was dismissed by the trial Court.
- The defendant preferred an appeal against the dismissal, in C.M.A.No.5 of 2016. The defendant also filed an application in I.A.No.359 of 2016 to receive additional evidence on behalf of the defendant.



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- The Appellate Court dismissed the appeal and also the interlocutory application and confirmed the order of the trial Court.
- Aggrieved by the judgment of the Appellate Court, the defendant has preferred this Civil Revision Petition.

4.The learned counsel for the defendant/revision petitioner submitted that the suit is for recovery of money; when the case was posted on 15.02.2013 for cross-examination of P.W.1, on that day, the defendant was suffering from viral fever and was bed-ridden, hence, he was unable to either appear before the Court or instruct his counsel; without any instructions, the counsel was not able to proceed with the case; therefore, his counsel represented before the Court that the defendant may be called; when the defendant was called, he was absent and hence, on the same day, the defendant was set *ex parte* and thereafter, an *ex parte* decree was passed on 06.03.2013. The learned counsel further submitted that the defendant was diligently contesting the suit and the absence of the defendant on 15.02.2013 was neither willful nor wanton and it was beyond his control. The learned counsel contended that the trial Court and the Appellate Court have dismissed the application only on the ground that the defendant did



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not produce any medical evidence to substantiate the cause which prevented him from appearing before the Court on that day and the Appellate Court has also taken into consideration the earlier defaults of the defendant and dismissed the impugned application. The learned counsel further contended that the sufficient cause for non-appearance refers only to the date on which the absence was made for proceeding *ex parte* and it cannot be stretched to rely upon other circumstances anterior in time. In support of this contention, the learned counsel relied on the decision of the Hon'ble Supreme Court in the case of ***G.P.Srivatsava v. Shri.R.K.Raizada and others [2000 (II) CTC 27]***. The learned counsel further contended the petition to condone the delay in filing the petition to set aside the *ex parte* decree was allowed on payment of costs, therefore, the consequential petition to set aside the *ex parte* decree also may be allowed. Therefore, the learned counsel prayed for an opportunity to be extended to the defendant to put forth his valid defence in the suit by setting aside the *ex parte* decree.

5.Per contra, the learned counsel appearing for the plaintiff/respondent disputed the contention of the learned counsel for the defendant that the defendant was suffering from viral fever. The learned



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counsel further submitted that, after the suit was filed, for non-filing of written statement, the defendant was set *ex parte* earlier on 20.10.2009.

Thereafter, the defendant filed I.A.No.8 of 2011 to condone the delay of 293 days in filing the application to set aside the *ex parte* order and it was allowed. Consequently, the defendant filed I.A.No.249 of 2011 to set aside the *ex parte* order and the same was also allowed. The defendant thereafter filed I.A.No.102 of 2012 for expert opinion to find out the age of the ink and the said application was also allowed on conditions, however, the defendant failed to comply with the conditions stated therein. Thereafter, the defendant did not choose to attend the Court. After giving many chances, when the case was posted for cross-examination of P.W.1 on 15.02.2013, the defendant was called absent and set *ex parte*. Hence, the learned counsel contended that the defendant had been given sufficient opportunities, but he deliberately remained absent stating false reasons and therefore, both the Courts below have rightly dismissed the application to set aside the *ex parte* decree. The learned counsel concluded his arguments by praying for dismissal of the Civil Revision Petition.



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6.This Court gave its anxious consideration to the rival submissions and also perused the entire materials placed before this Court.

7.The suit is for recovery of money. The defendant was called absent and set *ex parte* on 15.02.2013 and an *ex parte* decree was passed on 06.03.2013. Thereafter, the defendant has filed the impugned application under Order IX Rule 13 CPC to set aside the *ex parte* decree, stating that he was suffering from viral fever during the relevant point of time and hence, he was unable to appear before the Court on 15.02.2013. Both the Courts below concurrently held that the defendant has not produced any evidence to show that he was suffering from viral fever. The Appellate Court also relied upon the earlier defaults committed by the defendant and dismissed the application to set aside the *ex parte* decree, against which, the present revision has been filed.

8.Order IX Rule 13 CPC reads as follows :

“13. Setting aside decree ex parte against defendant :

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was



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passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.”

9. Therefore, an *ex parte* decree against a person can be set aside only if the person satisfies the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The “sufficient cause” alleged by the defendant in the present case is viral fever. Though illness can be considered to be a sufficient cause in a general scenario, the burden is on the person who approaches the Court to set aside the *ex parte* order to satisfy the Court that the illness has prevented him from appearing before the Court on the particular date. Moreover, in the case on hand, when the illness itself is disputed by the plaintiff, the



defendant is required to prove the same or satisfy the Court. In **Arjun Singh v. Mohindra Kumar & others [AIR 1964 SC 993]**, the Hon'ble Supreme Court has observed that, *"the only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause".*" Therefore, it is clear that a "sufficient cause" deserves to be proved to the satisfaction of the Court, especially when it is disputed on the other side. But the fact remains that the defendant has not taken any steps to satisfy the Court, for his absence.

10. Further, as rightly observed by the trial Court, the defendant has not even given the exact period of his illness. From a reading of the affidavit filed in support of the impugned application, it is seen that the defendant has made bald and vague averments that he suffered from viral fever before 15.02.2013 and no clear date as to when he fell ill or when he recovered, has been stated. Therefore, even the averments, by themselves, are not convincing.



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11. The judgment relied upon by the learned counsel for the petitioner in the case of *G.P.Srivatsava v. Shri.R.K.Raizada and others (supra)* is distinguishable on the facts of the case. In the said case, the nephew of counsel for defendant died and the defendant was out of station on the date of hearing, where he fell ill, however, in order to show his *bona fide*, he had produced the medical evidence in proof of his illness from a private Doctor. Whereas, in the present case, the defendant has made only an averment of illness and nothing more to show his *bona fide*. In the said judgment, it is also held as follows :

“If 'sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional.”



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However, in the case on hand, the fact remains that the defendant has neither made out his sufficient cause for non-appearance, nor has he approached the Court within the statutory time specified. Therefore, on the very ground of absence of satisfactory explanation of the “sufficient cause” itself, this Civil Revision Petition is liable to be dismissed. While so, the observations made by the Appellate Court with regard to the previous conduct of the defendant need not be gone into. In the considered view of this Court, there is no error in the dismissal of I.A.No.359 of 2016 to receive the copy of condone delay petition and its affidavit as additional evidence.

12.It is true that the delay of one day in filing the application to set aside the *ex parte* decree has already been condoned with costs. However, condonation of delay cannot be a ground to set aside the *ex parte* decree, inasmuch as the tests to be applied for deciding these two applications are different.



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13. Accordingly, this Civil Revision Petition is dismissed. No costs.

Consequently, connected miscellaneous petition is closed.

03.03.2022

Internet : Yes
Index : Yes / No
Speaking order / Nonspeaking order

To

1. The I Additional District Judge,
Erode.

2. The Sub-Judge,
Perundurai.



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S. KANNAMMAL, J.

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