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C.R.P.Nos.3902 of 2014 and 1887 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2023

DELIVERED ON : 03.03.2023

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.Nos.3902 of 2014 and 1887 of 2019
and M.P.No.1 of 2014

C.R.P.No.3902 of 2014:-

The Commissioner,
Salem City Municipal Corporation,
Salem-1.

.. Petitioner

Vs.

1. R.Mallika
Represented by Power Agent,
V.Subbarayan

2. The Town Planning Officer,
Salem City Municipal Corporation,
Salem-1.

.. Respondents

C.R.P.No.1887 of 2019:-

1. The Commissioner,
Salem City Municipal Corporation,
Salem-1.

2. The Town Planning Officer,
Salem City Municipal Corporation,
Salem-1.

.. Petitioners

Vs.

1. R.Mallika
Represented by Power of Attorney Holder,
V.Subbarayan

.. Respondents

Prayer in C.R.P.No.3902 of 2014:- Civil Revision Petition filed under



C.R.P.Nos.3902 of 2014 and 1887 of 2019

Section 115 of CPC to set aside fair and final order dated 10.09.2014 passed in R.E.P.No.71 of 2013 in O.S.No.164 of 1998 on the file of the Principal District Munsif at Salem and the allow the above C.R.P and pass such further or other orders as may be deemed fit and proper.

Prayer in C.R.P.No.1887 of 2019:- Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 26.03.2019 made in I.A.No.1401 of 2015 in O.S.No.164 of 1998 by the I Additional District Munsif, Salem and thereby condone the delay and afford an opportunity of hearing.

In C.R.P.No.3902 of 2014

For Petitioner : Mr.Hasan Mohamed Jinnah
State Public Prosecutor
assisted by
Mrs.N.Devi

For Respondents
For R1 : Mr.T.M.Hariharan
For R2 : Notice served

In C.R.P.No.1887 of 2019

For Petitioners : Mr.Hasan Mohamed Jinnah
State Public Prosecutor
assisted by
Mrs.N.Devi

For Sole Respondent : Mr.T.M.Hariharan



COMMON ORDER

The Civil Revision Petition in C.R.P.No.3902 of 2014 has been filed as against the fair and final order dated 10.09.2014 passed in R.E.P.No.71 of 2013 in O.S.No.164 of 1998 on the file of the Principal District Munsif at Salem, thereby allowing the petition under Order 21 Rule 11 of CPC to send the Judgment Debtor to the civil prison for willful disobedience of the decree in O.S.No.164 of 1998.

2. The Civil Revision Petition in C.R.P.No.1887 of 2019 has been filed as against the order dated 26.03.2019 made in I.A.No.1401 of 2015 in O.S.No.164 of 1998 by the I Additional District Munsif, Salem, thereby dismissing the petition to condone the delay of 4835 days in filing the petition to set aside the exparte decree passed in O.S.No.164 of 1998.

3. The petitioners in both the Civil Revision Petitions are the defendants in the suit filed by the first respondent viz., R.Mallika for mandatory injunction directing the petitioners herein to restore the building in the suit property and also sought for permanent injunction. On receipt of suit summons, the petitioners failed to file their written statement. Therefore, they were set exparte and an exparte decree was passed on 14.06.2001. In pursuant to the said decree,



the first respondent filed an execution petition in R.E.P.No.71 of 2013 in order to execute the decree passed against the petitioners herein. On receipt of the said notice, the petitioners filed an application in I.A.No.1401 of 2015 in O.S.No.164 of 1998, to set aside the exparte decree dated 14.06.2001 with a delay of 4835 days in filing the petition to set aside the exparte decree and the same was dismissed. Aggrieved by the same, the present C.R.P.No.1887 of 2019 has been filed. In the execution petition, the execution Court allowed the same and committed the petitioners to civil prison for a period of 15 days for non compliance of the decree passed in O.S.No.164 of 1998.

4. Mr.Hasan Mohamed Jinnah, the learned Senior Counsel submitted that the Judgment and Decree passed in O.S.No.164 of 1998 itself is not in consonance with the procedure laid down under the Code of Civil Procedure. The first respondent failed to add proper party in the suit filed for mandatory injunction and permanent injunction in respect of the suit schedule property. The Trial Court without even confirming any issues and point for consideration simply allowed the suit as prayed for, for the reason that the petitioners did not appear before the Trial Court and failed to file written statement. Therefore, the petitioners have got a good case to succeed in the suit. However, due to frequent change of officers, they could not instruct the counsel properly before



the Trial Court. Therefore, the petitioners stated bonafide reasons for non appearance before the Trial Court. Only after receipt of notice from the execution Court, the petitioners instructed their counsel to obtain a copy of the documents which were filed along with the suit and the Judgment and Decree. Thereafter, they directed the concerned person to trace out the bundle and instructed the counsel for filing proper application to set aside the exparte decree. Therefore, there was delay in 4835 days in filing a petition to set aside the exparte decree. The delay is neither willful nor wanton and it happened due to circumstances beyond the control of the petitioners inspite of many searches to locate the files. He also submitted that some of the officers concerned, who were at the helm of affairs at that time colluded with the first respondent and did not take any steps to appear before the Trial Court and failed to file their written statement. The suit property was also not properly mentioned in the decree and it is classified as “Pathai” and now laid pucca road for the use of common public. Therefore, larger interest of general public should not be affected by the impugned decree.

5. He further submitted that the suit property itself cannot be identified,



since the schedule is not clear. According to the first respondent, “A” schedule property ad-measuring 900 sq.ft in Old T.S.No.409, T.S.No.151, S.F.Nos. 85/1A and 85/2A, 50 ft East to West * $18\frac{3}{4}$ North to South = 937.5 sq.ft. The total extent of “B” schedule property is ad-measuring 765 sq.ft in Old T.S.No.409, T.S.No.151, S.F.Nos.85/1A and 84/2A, 45 ft East to West * 17 ft North to South = 765 sq.ft. According to the first respondent, one Lakshmiammal had purchased the property comprised in T.S.No.409 corresponding S.F.No.85/1A and 85/2A, ad-measuring 32 ft East to West * 25 ft North to South = 800 sq.ft by a registered sale deed dated 18.06.1958, vide Document No.2809 of 1958, which was marked as Ex.A2. However, allegedly the first respondent had purchased a property to an extent of 45 ft East to West * 17 ft North to South = 765 sq.ft only in T.S.No.409 corresponding to S.F.Nos.85/1A and 84/2A, by a registered sale deed dated 25.08.1986, vide Document No.2275 of 1986, which was marked as Ex.A3. Therefore, the first respondent had purchased only 765 sq.ft in Ex.A3 out of 800 sq.ft, which was marked as Ex.A2 in T.S.No.409 corresponding to S.F.Nos.85/1A and 84/2A. But the respondent had totally given the property covered under Ex.A2 as “A” schedule property and the property covered under Ex.A3 as “B” schedule property, as if she had purchased both the items. Even from Exs.A2 and A3, the first respondent had purchased only 765 sq.ft. Therefore, the first respondent



had played fraud upon the Court including the property comprised in T.S.No.151/1 as a suit schedule property. Actually the property comprised in T.S.No.151/1 is a public road, it has been classified as “Sarkar Poramboke Pathai”. Therefore, no one can claim any right or title over the said property. He also submitted that though, the petitioners did not choose to file their written statement, the standing counsel had appeared before the Trial Court. Only on his presence, the exparte Judgment and decree was passed by the Trial Court.

6. In support of his contentions, he relied upon the Judgments of the Hon'ble Supreme Court of India and as well as this Court in ***C.R.P.(NPD).No.3994 of 2016 and C.M.P.No.20197 of 2016*** in the case of ***Prabu Vs. Ramaiya and others***, in ***2015 (3) SCC 569*** in the case of ***Executive Officer, Antiyur Town Panchayat Vs. G.Arumugam (Dead) by legal representatives***, in ***2015 (15) SCC 208*** in the case of ***State of Tamil Nadu Vs. Anbai Kingston Philips and Ors*** and in ***2007 (4) SCC 221*** in the case of ***A.V.Papayya Sastry and others Vs. Government of A.P and others***.

7. Per contra, the learned counsel for the first respondent submitted that the petitioners did not state any sufficient cause to condone the huge delay of 4835 days in filing the petition to set aside the exparte decree. The



administrative reasons are not the grounds to excuse the delay in filing the petition. In fact, the written statement was also not filed along with the condone delay petition. Even prior to the application to condone the delay in filing a petition to set aside the exparte decree was being filed, the first respondent herein had filed an execution petition in R.E.P.No.71 of 2013. The petitioners had knowledge about the decree even after the receipt of the notice in the execution petition. In the execution petition, the petitioners filed a counter, as early as on 12.09.2013. They also filed an additional counter on 30.07.2014. Even then, the petitioners did not choose to file any petition to set aside the exparte decree. It was filed only on 13.10.2014. Therefore, the petitioners had full knowledge about the exparte decree, even in the year 2013, i.e, one year before filing the petition to set aside the exparte decree. Whereas, they filed an affidavit with false averments to condone the delay of 4835 days, as if the concerned seat clerk could not trace out the file in order to file a petition to set aside the exparte decree.

8. He further submitted that already the first respondent and others filed a suit in O.S.No.25 of 1992 as against the petitioners for declaration and permanent injunction in respect of the very same property. In the said suit also the petitioners failed to appear before the Trial Court and it was decreed in



favour of the first respondent herein. Therefore, already the suit property was declared in favour of the first respondent and in pursuant to the said decree, the first respondent filed the present suit for mandatory injunction and permanent injunction. In the present suit also they failed to appear before the Trial Court and they did not choose to file any written statement and as such they were set exparte and an exparte decree was passed in favour of the first respondent. Therefore, the execution Court rightly ordered for civil prison and it does not require any interference by this Court. At the same time, they also failed to state sufficient reasons to condone the huge delay of 4835 days in filing the petition to set aside the exparte decree.

9. In support of his contentions, he relied upon the Judgments of the Hon'ble Supreme Court of India reported in **2012 (5) SCC 157** in the case of ***Maniben Devraj Shah Vs. Municipal Corporation of Brihan, Mumbai***, in **2008 (17) SC 448** in the case of ***Pundlik Jalam Patil (Dead) by Lrs. Vs. Executive Engineer, Jalagaon Medium Project and Another***, in **2005 (11) SCC 800** in the case of ***P.Mani Moopanar Vs. K.Rajammal and others*** and in **2010 (5) SCC 459** in the case of ***Oriental aroma Chemical Industries Limited Vs. Gujarat Industrial Development Corporation and another***.



10. Heard the learned counsel for the petitioners and the learned counsel for the first respondent.

11. The petitioners are the defendants in the suit filed by the first respondent for mandatory injunction and permanent injunction in respect of the suit schedule property. On receipt of the suit summons, the petitioners failed to appear before the Court below and they were set exparte. On 14.06.2001, the exparte decree was passed in O.S.No.164 of 1998. In pursuant to the said decree, the respondent filed an execution petition in R.E.P.No.71 of 2013. On receipt of notice in the execution petition, the petitioners filed a counter and after ordering the execution petition, the petitioners had chosen to file a petition to set aside the exparte Judgment and Decree passed in O.S.No.164 of 1998, with a delay of 4835 days.

12. A perusal of the affidavit filed in support of the condone delay petition revealed that the first respondent instructed the concerned Assistant Engineer to trace out the original case file in order to file a petition to set aside the exparte decree. However, the original case file was not available, since the suit was filed in the year 1998. Thereafter, so many clerks changed in the said post, whom was looking the case. Further, there was change of standing



counsel and as such the present standing counsel approached the earlier counsel and obtained the bundle.

13. The case of the first respondent is that the suit property was originally purchased by Pachamuthu from one Lakshmiammal by the registered sale deed dated 25.08.1986 vide Document No.2275 of 1986. In turn, the said Pachamuthu sold out the suit property in favour of the first respondent herein by the registered sale deed dated 25.01.1991 vide Document No.185 of 1991. Thereafter, the first petitioner and others attempted to trespass into the suit property and as such the first respondent and others filed a suit in O.S.No.25 of 1992 on the file of the Principal Sub Judge, Salem, for declaration and permanent injunction in respect of “B” schedule property. In the said suit also the petitioners were absent and an ex parte decree was passed by the Judgment and Decree dated 26.10.1992. Thereafter, the petitioners had unlawfully dismantled the super structures in the said suit property and interfered with the peaceful possession and enjoyment of the suit property. Therefore, the first respondent and others filed a suit for mandatory injunction and permanent injunction.

14. Whereas, the case of the petitioners is that the property in Old Ward



H, New Ward AA Block 16, T.S.No.151/1 is a pathway. In the said pathway, there is some encroachments and as such the common public could not able to use the road. On the request of the common public, the petitioners removed the encroachments and cleared the pathway for the public usage. Though, the earlier suit was decreed in O.S.No.25 of 1992, it was pertaining to two schedule of properties and the present suit filed by the first respondent is as per Ex.A2 and Ex.A3. Ex.A2, sale deed dated 18.06.1958 revealed that the first respondent's vendor's vendor had purchased the property, ad-measuring 32 ft East to West * 25 ft North to South = 800 sq.ft. As per Ex.A3, the first respondent had purchased the property, ad-measuring 45 ft East to West * 17 ft North to South = 765 sq.ft. Therefore, there is a difference between both the documents and according to the petitioners, the first respondent had played fraud before the Trial Court and colluded with the officials and filed a suit. The further case of the petitioners is that the property comprised T.S.No.151/1 is a public road and it has been classified as “Sarkar Poramboke Pathai”. Therefore, no one could claim any right or title over the said property.

15. In order to substantiate the same, the learned Senior Counsel for the petitioners relied upon the Judgment reported in **2007 (4) SCC 221** in the case of **A.V.Papayya Sastry and others Vs. Government of A.P and others**, in



which, the Hon'ble Supreme Court of India held that it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot said to be a judgment or order in law. The judgment, decree or order obtained by playing fraud on the Court, is a nullity and non est in the eye of the law. Such a judgment , decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. That apart, the Judgment and Decree passed in O.S.No.164 of 1998 is not in consonance with the Order 20 Rules 4 and 5 of CPC. Accordingly, the Judgment of the Courts shall contain a concise statement of the case, the points for determination, the decision there on and the reasons for such decision. However, the Judgment and decree passed in the present suit does not confirm with these requirements as required under Order 20 Rule 4 CPC. It also does not reflect the issues involved in the suit.

16. It is relevant to extract the Judgment dated 14.06.2001 passed in O.S.No.164 of 1998 which is as follows:-

Judgment

“ Suit for Mandatory injunction and permanent injunction to pass an order of Mandatory injunction by directing the defendants and their subordinates to restore the building in the suit property as on 12.12.97 and fixed a period for doing the same and in default permit the plaintiff to put up a building at her



costs and recover the said amount from the defendants; restraining the defendants and their supporters by means of a permanent injunction from in any way interfering with the peaceful possession and enjoyment of the suit property by the plaintiff and his family members; and for costs.

I.A.462/98 dismissed at not pressed. PW1 examined in chief. Exhibits A1 to A8 marked. Suit claim is proved. Suit is decreed as prayed for with costs. Time for mandatory injunction is 6 months.

Pronounced by me in the open court, this the 14th day of June 2001."

17. The judgment, which does not contain the bare minimum facts, the point for determination, the evidence adduced and the application of those facts and evidence for deciding the issue would not qualify it to be called as "judgment". Further the practice of writing a judgment indicating that the defendant called absent and set as ex-parte and as such the claim was proved and the suit was decreed, deserves to be condemned and it should not be followed by the trial Court.

18. The judgment passed by the Court below is not satisfactory and the unreasoned judgement passed by the Court below is cryptic and it is ex-facie illegal. The Court below, while considering the petition to condone delay in settin aside the ex-parte decree, must also take this into consideration. It is also



relevant to refer the judgment reported in **2019 7 SCC 359** in the case of **Robin**

Thopa Vs Rohit Dora and the relevant paragraph is extracted hereunder:-

8. Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits.

19. The Order XX Rule 4 CPC would clearly state that the judgement of the Court shall contain a concise statement of the case, the points for determination, the decision there on and the reasons for such decision. Therefore, the judgment passed by the Court below does not conform with these requirements as provided under Order XX Rule 4 CPC and does not reflect the issues involved in the present case. The judgment passed by the Court below is cryptic, without following the procedure as contemplated under Section 2(9) of CPC.

20. Insofar as the delay is concerned the suit is filed for declaration and as if the trial Court considered the delay petition in a liberal manner and it has to be decided on merits. Due to frequent change of officers, they could not instruct the counsel properly before the Trial Court and they could not appear before the trial Court. Therefore, the length of delay is no matter and sufficiency of the explanation is the relevant criteria. This Court finds that the



ex-parte judgment passed by the trial Court is not in consonance with Order 20 Rule 4(ii) of CPC. Therefore, this Court has no hesitation to invoke the powers under Article 227 of the Constitution of India to set aside the ex-parte judgement and decree dated 26.03.2019 made in I.A.No.1401 of 2015 in O.S.No.164 of 1998 by the I Additional District Munsif, Salem.

21. The learned Senior counsel for the petitioners also relied upon the Judgment of the Hon'ble Supreme Court of India reported in **2015 (3) SCC 569** in the case of ***Executive Officer, Antiyur Town Panchayat Vs. G.Arumugam (Dead) by legal representatives***, in which the Hon'ble Supreme Court of India held that while dealing with the condone delay petition, the Court must always take a justice oriented approach while considering an application for condonation of delay. If the Court is convinced that there had been an attempt on the part of the Government officials or public servants to defeat justice by causing delay, the Court, in view of the larger public interest, should take a lenient view in such situations, condone the delay, howsoever huge may be the delay and have the matter decided on merits.

22. In the case on hand also there were some collusion between the



Government officials and the respondents. Therefore, though they engaged standing counsel on their behalf, they have failed to instruct properly to file their written statement, they were remained absent before the Trial Court and they were set exparte. Only after receipt of the notice in the execution petition, the officer concerned at that time had taken steps to file a petition to set aside the exparte decree. Therefore, in view of the larger public interest, this Court is of the considered opinion to take lenient view to condone the delay of 4835 days in filing a petition to set aside the exparte decree.

23. The learned counsel for the first respondent vehemently contended that the reasons stated in the affidavit in support of the condone delay petition are not sufficient and they have stated false reasons. In support of his contention, he relied upon the Judgment of the Hon'ble Supreme Court of India reported in **2012 (5) SCC 157** in the case of **Maniben Devraj Shah Vs. Municipal Corporation of Brihan, Mumbai**, in which it was held as follows:-

“ 28. The applications filed for condonation of delay and the affidavits of Shri Sirsikar are conspicuously silent on the following important points:

a) The name of the person who was having custody of the record has not been disclosed.

b) The date, month and year when the papers required for filing the first appeals are said to have been misplaced have not been disclosed.

c) The date on which the papers were traced out or



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recovered and name of the person who found the same have not been disclosed.

d) No explanation whatsoever has been given as to why the applications for certified copies of the judgments of the trial Court were not filed till 23.8.2010 despite the fact that Shri Sirsikar had given intimation on 12.5.2003 about the judgments of the trial Court.

e) Even though the Corporation has engaged battery of lawyers to conduct cases on its behalf, nothing has been said as to how the transfer of Shri Ranindra Y. Sirsikar operated as an impediment in the making of applications for certified copies of the judgments sought to be appealed against.”

24. He also relied upon the Judgment of the Honb'le Supreme Court of

India reported in **2008 (17) SC 448** in the case of **Pundlik Jalam Patil (Dead)**

by Lrs. Vs. Executive Engineer, Jalagaon Medium Project and Another, in

which it was held as follows:-

“It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court. The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court ought to have refused to exercise its discretion. The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court.”

25. It is true that where there is no sufficient cause for condoning the



delay, but the delay condoning is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior Court. However, the facts and circumstances are completely different in the case on hand. Therefore, the Judgments cited by the learned counsel for the first respondent are not helpful to the case on hand, since some officers colluded with the respondent and remained exparte before the Trial Court. Further, the subject land is classified as “Sarkar Poramboke Pathai” and now the petitioners laid road and it is put in for common use for general public.

26. Therefore, this Court is of the considered opinion that the suit has to be decided on its merits and in accordance with law by giving sufficient opportunity to the petitioners and this Court is inclined to compensate with cost for the inconvenience caused to the first respondent.

27. In view of the above, the order dated 26.03.2019 made in I.A.No.1401 of 2015 in O.S.No.164 of 1998 by the I Additional District Munsif, Salem, is hereby set aside, on condition that the petitioners shall pay a sum of Rs.10,000/- (Rupees Ten Thousand only) by way of demand draft, as cost to the first respondent, within a period of two weeks from the date of receipt of a copy of this order. On such payment, the Trial Court is directed to



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proceed with the suit, on merits and in accordance with law and dispose of the same, within a period of six months thereafter.

28. Accordingly, the C.R.P.No.1887 of 2019 is allowed. No costs.

29. In view of the order passed in C.R.P.No.1887 of 2019, the fair and final order dated 10.09.2014 passed in R.E.P.No.71 of 2013 in O.S.No.164 of 1998, on the file of the Principal District Munsif at Salem, is hereby set aside. Accordingly, the C.R.P.No.3902 of 2014 is allowed. Consequently, connected Miscellaneous petition is closed. No costs.

03.03.2023

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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C.R.P.Nos.3902 of 2014 and 1887 of 2019

G.K.ILANTHIRAIYAN,J.

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To

1. The Principal District Munsif, Salem.
2. The I Additional District Munsif, Salem.

Pre-Delivery Order made in
C.R.P.Nos.3902 of 2014 and 1887 of 2019
and M.P.No.1 of 2014

03.03.2023