



C.R.P.(MD)No.995 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 11.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

C.R.P.(MD)No.995 of 2019

S.Kishore Kumar

... Petitioner / Petitioner/Plaintiff

Vs.

N.Sekar

... Respondent / Petitioner/2nd Defendant

Prayer: This Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure, against the fair order and executable order, in I.A.No.529 of 2018, in O.S.No.16 of 2013 on the file of the IVth Additional District Judge, Madurai, dated 06.12.2018.

For Petitioners : Mr.S.Manohar

For Respondents : Mr.A.V.Arun

ORDER

The instant Civil Revision Petition has been filed against the order, in I.A.No.529 of 2018, in O.S.No.16 of 2013 on the file of the IVth Additional District Judge, Madurai, dated 06.12.2018.



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2. The revision petitioner is the respondent / plaintiff and the respondent herein is the petitioner / second defendant before the Court below.

3. For the sake of convenience, the parties are referred to according to their litigative status before the Court below.

4. It appears that the plaintiff has filed the suit for the relief of specific performance and for delivery of possession in respect of the schedule mentioned property. The total consideration according to the plaintiff was Rs.79,70,000/-. In which, according to the plaintiff, Rs. 25,00,000/- has already been paid as an advance. It is the submission of the plaintiff that the suit was decreed on 31.07.2017.

5. However, the second defendant has filed an application under Order 9 Rule 13 C.P.C along with delay condonation application under Section 5 of the Limitation Act, to condone the delay of 310 days in filing the connected applications, to set aside the ex parte decree.



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6. The learned counsel for the plaintiff would submit that when the decree has been passed, based upon the substantial evidence of the parties and has been allowed on merits, the very filing of the application under Section 5 of the Limitation Act, is not maintainable. Therefore, contended that the order of the Court below in allowing the application is liable to be interfered with. The learned counsel for the plaintiff has also relied upon the latest judgment of the Hon'ble Supreme Court in S.L.P.No.3543 of 2019 in a case of ***Y.P.Lele V. Maharashtra State Electricity Distribution Company Ltd.***

7. Per contra, the learned counsel for the second defendant would submit that even as per the judgment, dated 31.07.2017, this defendant was set *exparte*, therefore, would vehemently submit that the very application under Order 9 Rule 13 C.P.C, as against the defendant is maintainable. Therefore, the learned counsel would submit that, since there was a delay of 310 days in filing the application, to set aside the *exparte* decree, he moved an application under Section 5 of the Limitation Act.



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8. The learned counsel for the second defendant would further submit the second defendant has believed his brother, who is the first defendant. He would submit that since the first defendant engaged a counsel for this second defendant, has not properly intimated about the stage of the suit, and that the second defendant came to know about the *exparte* decree only when he received summons in I.A.No.302 of 2018, and that in the meanwhile, there was a delay of 310 days. Hence, the learned counsel would submit that in the wisdom of the Court below, has exercised its discretion and allowed the Section 5 of Limitation Act application, therefore, the same should not be interfered with.

9. The learned counsel for the second defendant has relied upon the judgments of the Hon'ble Supreme Court reported in **2008-13-SCC-466 (Bank of India V. Mehta Brothers)** and **2019-4-CTC-122 (G.Ratna Raj (D) V. Sri Muthukumarasamy Permanent Fund Ltd.)**.

10. I have given my anxious consideration to the either side submissions.



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11. First of all, we must see whether the judgment, in which, an application is being filed to set aside the exparte decree is based on merits or an exparte decree. On perusal of the judgment, the second defendant admittedly has been set exparte. However, as against the first defendant, the suit was decreed on merits. On the other hand, it is the submission of the second defendant's counsel that, since the first defendant has not been cross examined, the very judgment cannot be construed as the judgment on merits.

12. The learned counsel for the plaintiff would invite the attention of this Court, to the explanation of Order 17 Rule 2 of C.P.C, and would contend that, since the substantial part of the evidence of the first defendant has already been recorded, the contention of the second defendant that, the judgment is not on merits, is irrational.

13. In this connection, the learned counsel for the plaintiff would rely upon the judgment of the Hon'ble Supreme Court held in S.L.P.No.3543 of 2019 in a case of ***Y.P.Lele V. Maharashtra State Electricity Distribution Company Ltd.*** The relevant portion of the



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judgment is as follows-

*“19. Now coming to the explanation, what is stated therein is that where the evidence or a substantial portion of the evidence of **any party** has already been recorded and **such party** fails to appear on any day to which the hearing of the suit is adjourned, the Court would be at liberty to proceed with the case as if **such party** were present. **Two phrases are important in the explanation “any party” and “such party”. “Any party” refers to the party which has led evidence or substantial evidence and “such party” refers to that very party which has led evidence or substantial evidence. What is discernible is that under Order XVII Rule 2, the Court would proceed to pass orders with respect to any of the parties being absent or both the parties being absent. Whereas the explanation is confined to record the presence of that party and that party alone, which has led evidence or substantial evidence and has thereafter failed to appear. In the present case, admittedly the suit was at the stage of plaintiff’s evidence as is apparent from the order dated 04.12.2004. The evidence of the defendants had not even started and the defendants’ counsel had not even cross-examined the plaintiff’s evidence.”***

(Emphasis supplied by this Court)



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14. According to the above ratio, the Hon'ble Supreme Court held that, as against the party, who recorded the substantial evidence, if they fail to appear in the proceedings, then judgment can be passed on merits against them. Here the plaintiff alone led in substantial evidence including the cross examination by the first defendant. Therefore, though the defendant appears to have not led in any evidence, his cross examination against the plaintiff would definitely a substantial evidence on behalf of the first defendant.

15. At this juncture, this Court would like to extract the Order 17 Rule 2 C.P.C. :-

“22 . Procedure if parties fail to appear on day fixed.

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation-

Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the



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suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.”

16. The explanation to the Order 17 Rule 2 C.P.C., refer the word “substantial portion of the evidence of any party has already been recorded”. Through the above reference, the learned counsel for the second defendant would submit that only the substantial portion of the plaintiff's side evidence, has been let in, and that the first defendant has only filed a proof affidavit, therefore, no substantial portion of the evidence of the first defendant was let in before the Court. As such, the learned counsel for the second defendant would submit that the judgment of the Court below in it's entirety is not the judgment after full contest.

17. At this juncture, this Court deem it appropriate to extract the definition of the word “evidence”, which has been defined in Section 3 of the Indian Evidence Act:

.....“Evidence” means and includes - (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;



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(2) *[all documents including electronic records produced for the inspection of the Court], such documents are called documentary evidence.*

18. As per the above definition, all statements, which the Court permits to be recorded becomes the evidence. In that context, as we already stated elsewhere in the order, if we look at the cross examination of the first defendant, he (the first defendant) put forth his case to the plaintiff by way of a cross examination and during his cross examination, he obtained answers by way of a statement from the plaintiff. Therefore, this Court is of the view that the very statement recorded through cross examination is the substantial evidence of the first defendant. Therefore, this Court respectfully disagree from the submission of the learned counsel for the second defendant that the decree in it's entirety should be treated as an exparte decree.

19. At the same time, in the ***Y.P.Lele case*** (cited supra), it has been explained very lucidly about the word “any party” and “such party”. Ultimately, held that the word “any parties”, is the party who has



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let in evidence or substantial evidence. The word “such party” denotes the very party who has let in evidence or substantial evidence.

20. Here, as discussed supra, the first defendant will come within the definition of the word ”such party”, as he has cross examined the plaintiff. Therefore, this Court is having no iota of doubt about the nature of decree as against the first defendant, as the decree against him is on merits. To put it differently the decree in it's entirety can not be construed as *exparte* decree.

21. Therefore, now, we are only concerned about the decree passed against the second defendant. Admittedly, as against the second defendant, the decree was an *exparte* one.

22. At this juncture, the learned counsel for the second defendant took another line of argument and would submit that since the decree directs both the first and second defendant to execute the sale deed, the decree become indivisible. Hence, by following the first proviso, of Order 9 Rule 13 C.P.C, while setting aside the decree as



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against the second defendant, the decree against the first defendant also is liable to be set aside.

23. In this regard, the learned counsel for the second defendant would rely upon the judgment of the Hon'ble Supreme Court reported in **2008-13-SCC-466 (Bank of India V. Mehta Brothers)**. The relevant portion of the judgment is as follows-

*“29. Therefore, keeping this in mind, let us now consider whether a contested decree by some of the defendants can be set aside while considering the application for setting aside the ex parte decree against one of the defendants. This would, in our view, certainly depend on the nature of reliefs claimed by the plaintiff in his plaint and the nature of the decree in question. **If the decree is indivisible, the court would be at liberty to set aside the decree not only against the defendant who applied for setting aside the exparte decree passed against him, but also as against all or any of the other defendants.**”*

(Emphasis supplied by this Court)

Though the proposition putforth by the second defendant is settled one, here the crucial word is, “if the decree is indivisible”. Therefore, now we



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must see whether the decree is indivisible. In this context, it is relevant to refer Section 12 of Specific Relief Act. As per the above provision, an agreement can be partially enforced. If that being the case, in view of the decree against the first defendant on merits, the same can be executed separately.

24. Coming back to the sufficient cause, while perusing the impugned order the Court below has believed the statement made by the petitioner in respect of the delay. When the Court below in its wisdom has positively found sufficient cause to condone the delay of 310 days, this Court should be slow in interfere with the said order, unless the same is perverse. In this regard, it is useful to refer the judgment of the Hon'ble Supreme Court reported in ***AIR-1998-SC-3222 (BalaKrishnan V. Krishnamoorthy)***. The relevant portion of the judgment is as follows

Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted



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time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

(Emphasis supplied by this Court)

This Court could not find any perversity in the order of the Court.

25. Therefore, this Court is of the view that the very order passed by the Court below is liable to be confirmed. However, considering the hardship faced by the plaintiff, this Court is inclined to enhance the cost from Rs.2,000/- to Rs.25,000/-.



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26. Hence, the instant Civil Revision Petition stands **dismissed** by directing the second defendant to pay enhanced cost in a sum of Rs.25,000/- to the plaintiff within a period of four weeks from the date of receipt of copy of this order. Failing which, the petition in I.A.No.529 of 2018 will be stands dismissed automatically.

27. Considering the nature of the suit, the Court below is directed to dispose of the suit as expeditiously as possible preferably, within a period of six months, however, subject to the out come of the application filed, to set aside the exparte decree, as against this second defendant.

11.09.2023

NCC : Yes/No
Index :Yes/No
Ls



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- 1.The District Munsif cum Judicial Magistrate,
Sivagiri.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.KUMARAPPAN.,J.

Ls

Order made in
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