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C.M.A.No.1521 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.12.2024

CORAM :

THE HONOURABLE MR. JUSTICE **M. DHANDAPANI**

C.M.A.No.1521 of 2020

1.T.Vijayan (died)

2.Devi

... Appellants

Vs.

1.A.Asaithambi

2.Jeevarathinam

3.T.Rani

4.Vidhya

5.Charuhasini

6.V.Gopi

... Respondents

[Respondents 3 to 6 brought on record as LR's of the deceased 1st appellant viz., T.Vijayan vide order dt. 21.10.2021 made in C.M.P.Nos.16956 & 16954 of 2021 in C.M.A.No.1521 of 2020]

[R4 to R6 declared as major and their Court guardian C.Jayakumar, Advocate, Salem discharged from guardianship and name of the R6 amended vide order dt. 12.12.2013 made in C.M.P.Nos.28216, 28219 & 28221 of 2023]

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1(d) of CPC, against the Fair and Decretal order dated 09.01.2020 passed in I.A.No.392 of 2019 in O.S.No.314 of 2013 on the file of the III Additional District Judge, Salem.



C.M.A.No.1521 of 2020

For Appellant : Mr.P.Jagadeesan

For Respondents : Mr.A.Raghupathy [R1]

Mr.R.Jayaprakash [R2]

No appearance [R3 to R6]

JUDGMENT

Aggrieved by the fair and decretal order passed by the learned III Additional District Judge, Salem, in I.A.No.392 of 2019 in O.S.No.314 of 2013, dated 09.01.2020, the appellant has preferred the present appeal.

2. The case of the appellant is that, the respondents 1 and 2 filed a suit in O.S.No.314 of 2013 against the appellants and respondents 4 to 6 herein for specific performance and also for permanent injunction. The appellants and the respondents 4 to 6 are defendants and since the defendants 3 to 5 are minors, the Court appointed a Court guardian. Since they have not filed their written statement, they were set *ex-parte*. After contest, an *ex-parte* decree was passed by the trial court on 08.12.2015. Thereafter, the appellants have filed an application to set aside the *ex-parte* decree passed against them on 08.12.2015 and since they have filed the same with 109 days delay, an application to condone



C.M.A.No.1521 of 2020

the delay was also filed. The Trial Court dismissed the applications vide order dated 13.06.2017 even before numbering stating that the appellants are well aware of the proceedings, but they have not taken steps to file their written statement. Challenging the same, the appellants preferred Civil Revision Petition before this Court in C.R.P.(NPD).No.1215 of 2018. After issuance of notice to the respondents and in the presence of both the counsel, this Court allowed the same on 10.07.2018 by setting aside the order made in unnumbered interlocutory application vide order dated 13.06.2017 on the file of the learned III Additional District Judge, Salem and directed the learned Trial Judge to take up the interlocutory applications on file and after issuance of notice to respondents and after giving opportunity to both the parties, dispose of the interlocutory applications on merits in accordance with law. Against the same order made in unnumbered I.A.No. of 2017 dated 13.06.2017 filed under Order IX Rule 13 of CPC for setting aside the *ex-parte* decree dated 08.12.2012, the appellants preferred Civil Miscellaneous Appeal before this Court in C.M.A.No.1394 of 2018. This Court, by judgment dated 12.12.2018, allowed the same by setting the order in unnumbered I.A.No. of 2017 in O.S.No.314 of 2013 dated 13.06.2017 and directed the learned Judge to number the application and after issuance of notice to



C.M.A.No.1521 of 2020

respondents, pass appropriate orders in accordance with law, pursuant to which, the I.A. was numbered and taken on file in I.A.No.392 of 2019 in O.S.No.314 of 2013 and the same was dismissed vide order dated 09.01.2020. Challenging the same, the present appeal has been filed.

3. Learned counsel appearing for the appellants submitted that the suit property was settled by the father of the 1st appellant exclusively in favour of the 1st appellant and respondents 4 to 6/defendants 3 to 5 are not entitled to claim any right over the property, unless the 1st appellant settles the property in favour of the defendants 3 to 5. In the present case, at the time of passing final decree, the property stands in the name of the 1st appellant alone and not in the name of the defendants 3 to 5. Though the Trial Court observed in the *ex-parte* decree that defendants 3 to 5 have no right in the property, however, passed *ex-parte* decree as against the appellants. Thereby, the appellants are entitled to file the petition under Order 9 Rule 13 of CPC. Accordingly, he prays for appropriate orders.

4. Learned counsel appearing for the 1st respondent submitted that this Court may pass appropriate orders in terms of Order 9 Rule 13 of



C.M.A.No.1521 of 2020

WEB COPY

5. Learned counsel appearing for the 2nd respondent reported 'no instructions'.

6. Heard the learned counsel appearing for the appellant, learned counsel for the 1st respondent and the learned counsel appearing for the 2nd respondent and also perused the materials available on record.

7. Admittedly, the respondents 1 and 2 have filed a suit in O.S.No.314 of 2013 for specific performance, refund of excess amount drawn and permanent injunction by impleading appellants and respondents 4 to 6 as defendants. They were set *ex-parte* by the Trial Court on 05.09.2014 and notice served only on the minor defendants, thereby, the Trial Court appointed the court guardian and the court guardian cross-examined P.W.1 on behalf of defendants 3 to 5. Thereafter, final decree was passed on 08.12.2015, against which, the appellants filed Interlocutory Application in terms of Order 9 Rule 13 of CPC to condone the delay of 109 days to set aside the *ex-parte* decree and both the applications were dismissed at the unnumbered stage.



C.M.A.No.1521 of 2020

Aggrieved by the same, the appellants have filed C.R.P.(NPD) No.1215 of 2018 and C.M.A.No.1394 of 2018 and the same was allowed on 10.07.2018 and 12.12.2018 by issuing direction to the Trial Court to number the applications and dispose of the same on merits, pursuant to which, the application to condone the delay was allowed by recording the no objection made by the respondents 1 and 2 vide order dated 26.09.2018, however, the application to set *ex-parte* decree was dismissed on the ground that no document was produced with regard to the illness suffered by the appellants. Once an order has been passed on the merits of a case, an application under Order 9 Rule 13 of CPC is not maintainable. Admittedly, without hearing the appellants, the *ex-parte* order was passed on 05.09.2014 and *ex-parte* decree was passed on 08.12.2015.

8. Order 9 Rule 13 of CPC read as follows :-

“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 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:

1[Provided further than 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.]

2[Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]”



9. A perusal of the above provision and proviso thereto makes it clear that *ex-parte* decree cannot be set aside only as against such defendants who have been issued with notice but it may be set aside as against any other defendants, who have not been issued with notice. Any of the defendants who had not contested the case before the Trial court, could very well question the *ex-parte* order. In the present case, no notice has been issued to the appellants herein but the *ex-parte* decree had come to be passed against the appellants, who have not contested the case before the trial court. In such a backdrop, the appellants are entitled to question the said order and seek setting aside of the said order. Therefore, for want of notice and the appellants not having been heard, the order passed by the trial court dismissing the I.A. filed by the appellants is *per se* unsustainable and against the provisions of Order 9 Rule 13 CPC and the same is liable to be set aside.

10. Accordingly, the fair and decreetal order dated 09.01.2020 passed in I.A.No.392 of 2019 in O.S.No.314 of 2013 on the file of the III Additional District Judge, Salem is set aside and the Trial Court is directed to restore the suit in O.S.No.314 of 2013 on file and allow the parties to let in evidence and thereafter, dispose of the suit in O.S.No.314



C.M.A.No.1521 of 2020

of 2013, as expeditiously as possible.

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11. With the above observations and directions, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

02.12.2024

Index : Yes / No

Speaking order / Non-speaking order

Neutral Citation Case : Yes / No

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To

The III Additional District Judge, Salem.



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C.M.A.No.1521 of 2020

M.DHANDAPANI, J.,

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C.M.A.No.1521 of 2020

02.12.2024