



C.R.P.(MD)No.1384 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.03.2024

Pronounced on : 04.06.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.1384 of 2018

and

C.M.P.(MD)Nos.5986 of 2018 and 1801 of 2024

Panchavarnam

... Petitioner

Vs.

1. S.Ramachandran (Died)

2. S.Vijayalakshmi

3. S.Shanmugam @ Ganesan

(Memo dated 07.11.2023 in USR No.38663 is recorded to the effect that respondents 1 and 3 died issueless, and R2-sister of the deceased R1 and R3, who is already on record, is recorded as LR of the deceased Respondents 1 and 3 vide Court order dated 04.01.2024 made in CRP(MD) No.1384 of 2018)

... Respondents

Prayer : This Civil Revision Petition filed under Section 115 C.P.C., to allow the Civil Revision Petition and set aside the fair order and decretal order passed in I.A.No.433 of 2013 in O.S.No.288 of 2007 dated 08.02.2018 on the file of 1st Additional Sub Court, Madurai.



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For Petitioner : Mr.C.Godwin
For R2 : Mr.A.K.Gopalan
for Mr.G.Ramapandian

ORDER

The Civil Revision Petition is directed against the order passed in I.A.No.433 of 2013 in O.S.No.288 of 2007 dated 08.02.2018 on the file of the Principal Subordinate Court, Madurai, allowing the application filed under Order 9 Rule 13 C.P.C.

2. The revision petitioner as plaintiff has filed a suit in O.S.No.288 of 2007 against one Subramanian/first defendant and the respondents/defendants 2, 4 and 3 claiming the relief of specific performance of the sale agreement dated 20.02.2004. The respondents were set *ex parte* and an *ex parte* judgment and decree came to be passed on 23.06.2009 granting the relief of specific performance as prayed for.

3. It is not in dispute that in pursuance of the decree obtained, the revision petitioner has laid an execution and got a sale deed executed through the process of the Court.



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4. The respondents, by alleging that no summons were served on them and they were not aware of the suit proceedings, have filed an application under Order 9 Rule 13 C.P.C. in I.A.No.433 of 2013 on the file of the 1st Additional Subordinate Court, Madurai. The revision petitioner has filed a counter statement raising objections. During enquiry, the respondents have examined the second respondent as P.W.1 and exhibited 11 documents as Ex.P.1 to Ex.P.11. The revision petitioner has examined herself as R.W.1 and exhibited 7 documents as Ex.R.1 to Ex.R.7. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed a conditional order dated 08.02.2018 directing the respondents to pay cost of Rs.2,000/- to the revision petitioner on or before 15.02.2018, failing which, the application shall stand dismissed. Aggrieved by the impugned order, the plaintiff has preferred the present revision.

5. The case of the respondents, in the affidavit filed in support of the application filed under Order 9 Rule 13 C.P.C., is that one Duraisamy filed a suit against them in O.S.No.1327 of 2003 for specific performance of the very same property, as if, their father executed Varthamana letter sale



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agreement in his favour, that the respondents were harassed by the said Duraisamy and hence, they left Melur and gave power to the first defendant Subramanian vide power of attorney deed dated 17.09.2003 to deal with the property in all aspects, that since during the pendency of the said suit in O.S.No.1327 of 2003 their power agent first defendant began to act against their interest, the respondents cancelled the power deed vide cancellation deed dated 24.02.2006, that the said cancellation was duly informed to the first defendant and the Sub Registrar, Melur vide lawyer notice dated 29.03.2006, that the respondents have then appeared directly in the said suit in O.S.No.1327 of 2003 and after trial, the suit was dismissed on 31.10.2012, that the respondents, after succeeding the said suit, went to their suit property, but they were prevented and pushed out of the house by the revision petitioner stating that she has become the owner of the property, that the respondents gave a police complaint before the Superintendent of Police, Madurai on 22.03.2013 and during police enquiry, the revision petitioner gave a statement that she filed a suit against them and got an *ex parte* decree on 23.06.2009 and also obtained sale deed on 31.01.2012, that the respondents were not aware of either the suit proceedings or the execution proceedings, that after verifying the case



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records with the help of their lawyer, the respondents came to understand that the revision petitioner has filed a suit against them and the said Subramanian, that the revision petitioner has given false address for the respondents, as if, they were residing at Door No.14, Middle Street, Keerathurai, Madurai, but they never resided in the said address at any point of time, that the suit summons were returned as “no residence” and the revision petitioner, after effecting substitute service, has obtained the *ex parte* decree, as if, the respondents wantonly evaded the summons and failed to appear before the Court, that the respondents have been residing at Chennai in their friend's house due to their financial problem from the year 2005 and were coming to Melur now and then for conducting the other suit in O.S.No.1327 of 2003, that the respondents have a valid defence in the suit, that the revision petitioner has obtained the *ex parte* decree behind their back by furnishing false and wrong address and without giving them an opportunity to contest the case, that non-appearance of the respondents is neither wanton nor willful and that therefore, the respondents were constrained to file the above application for setting aside the *ex parte* decree dated 23.06.2009.



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6. It is the further case of the respondents that they have got knowledge of the suit and the *ex parte* decree only on 25.03.2013 during the police enquiry conducted by the office of the Superintendent of Police, Madurai, that they have filed an application on 17.04.2013 within one month from the date of their knowledge for setting aside the *ex parte* decree under “A” number 11908, that the said application was misplaced by the office of the Subordinate Court and the same could not be traced, that therefore, the respondents were constrained to file a fresh application and that the respondents will be put to untold hardship and irreparable loss, if the *ex parte* decree is not set aside and moreover, no prejudice will be caused to the other side.

7. The defence of the revision petitioner raised in the counter affidavit is that the respondents have executed a general power of attorney in respect of the suit property to the first defendant on 17.09.2003, that the revision petitioner has entered into a registered sale agreement on 20.02.2004 with the first defendant, that the first defendant has requested the revision petitioner to prepare a sale deed in stamp papers for registering the same on 11.06.2004 and accordingly, the revision petitioner



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has purchased the stamp papers and paid the balance sale consideration of Rs.4,00,000/- to the first defendant on 11.06.2004, that though the first defendant has given a receipt thereof, he refused to come to the Registrar office, that the first defendant and the respondents have handed over the possession of the suit property to the revision petitioner and she has been paying the property tax and electricity consumption charges, that the revision petitioner was forced to file a suit for permanent injunction restraining the first defendant and the respondents from alienating and encumbering the suit property to third parties in O.S.No.511 of 2004 on the file of the District Munsif Court, Melur, that the first defendant came for compromise and in pursuance of the settlement, the revision petitioner has paid Rs.50,000/- on 13.11.2005 and the first defendant has received the same and executed a receipt thereof, that the revision petitioner, in view of the settlement arrived at, did not prosecute the suit in O.S.No.511 of 2004, that the first defendant and the respondents even subsequently were not ready and willing to execute a sale deed and hence, the revision petitioner was constrained to file the suit for specific performance and the same was decreed *ex parte* on 23.06.2009, that since the respondents have not chosen to execute the sale deed, she filed an execution petition and got



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sale deed executed through the process of the Court and that the first defendant and the respondents were fully aware of the suit as well as the execution proceedings.

8. It is the further case of the revision petitioner that the second respondent has filed a petition on 22.02.2008 before the Judicial Magistrate, Melur and got a direction to register a case against the revision petitioner and on that basis, Melur Police registered a case in Crime No. 140 of 2008, that during enquiry, the revision petitioner has produced the plaint copy and informed the pendency of the civil suit and as such, the respondents were aware of the present suit in the year 2008 itself, that the first defendant and the respondents, without entering into appearance, have allowed the suit to be decreed *ex parte* on 23.06.2009, that the police complaint was found to be false and the same was closed as mistake of fact, that subsequently the respondents have again lodged a false complaint before the Superintendent of Police, Madurai, that the police, after enquiry, found that the respondents were frequently giving false complaint suppressing the civil cases and warned them not to prefer any such complaint, that their allegation that they came to know about the



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decree only on 25.03.2013 is utter false, that the second respondent, in the FIR lodged, has alleged that they were residing at various places in Madurai, Aruppukottai and Chennai, but in the affidavit, they have taken a stand that they were residing at Chennai in their friend's house from the year 2005, that the respondents have resided at Keerathurai, Madurai and they came to know about the suit in the year 2008 itself, that the revision petitioner has been in possession and enjoyment of the suit property and that since the respondents have filed the above vexatious application, the same is liable to be dismissed with cost.

9. It is not in dispute that the suit property was originally owned by the respondents. Admittedly, the respondents 1 and 3 are the brothers of the second respondent and all of them were unmarried. Pending revision, the respondents 1 and 3 had died leaving behind the second respondent as the only legal heir and to that effect, a memo came to be filed.

10. It is also not in dispute that the respondents have executed a registered power of attorney deed in favour of the first defendant Subramanian vide document dated 17.09.2003.



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11. It is the specific case of the respondents that they have appointed the first defendant as power agent only to deal with the suit property and more particularly defend the suit initiated by one Duraisamy in O.S.No. 1327 of 2003 for specific performance and that subsequently since the power agent began to act against their interest, they have cancelled the power deed vide cancellation deed dated 24.02.2006. But according to the revision petitioner, the first defendant, in pursuance of the power of attorney deed dated 17.09.2003, has entered into a sale agreement with the revision petitioner on 20.02.2004 and that the first defendant, even after receiving the entire sale consideration, has not chosen to execute the sale deed, the revision petitioner was forced to file the suit for specific performance of the agreement. At this stage, we are not concerned with the merits of the case.

12. The main contention of the respondents is that no suit summons were served on them and they were not aware of the suit proceedings as well as the execution proceedings. But according to the revision petitioner, on the basis of the complaint given by the second respondent, FIR came to be registered in Crime No.140 of 2008 on the file of B1 Melur Police



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Station on 26.03.2008 against the first defendant, revision petitioner and one Mariyappan/retired police inspector and in the above police enquiry, the revision petitioner has informed about the filing and pendency of the present suit and that therefore, the respondents were fully aware of the pendency of the suit in the year 2008 itself.

13. It is the further case of the revision petitioner that in the police enquiry conducted in pursuance of a complaint lodged by the second respondent before the Superintendent of Police, Madurai, the police authorities, after finding that the respondents were frequently giving false complaint suppressing the civil cases, warned them and that therefore, even at that time also, they were fully aware of the suit proceedings.

14. It is evident from the records that the suit summons sent to the respondents were returned as “no residence” on 09.01.2008 and subsequently, private notice was ordered. The learned trial Judge, upon perusing the case records, has observed that it is not known as to whether private notice was sent, as directed by the Court, but subsequently substitute service was ordered and on that basis, paper publication was



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effected on 24.04.2008 and on production of the same before the trial Court, the respondents were called absent and set *ex parte*.

15. According to the respondents, they were residing at Chennai at the relevant point of time, but according to the revision petitioner, the respondents were residing at Door No.14, Keerathurai, Madurai. As already pointed out, summons which were sent to the address Door No.14, Keerathurai, Madurai were returned as “no residence”. Though the revision petitioner has alleged that the respondents were aware of the suit proceedings in the year 2008 itself when FIR came to be lodged on the basis of the complaint given by the second respondent, it is pertinent to note that the second respondent has given her address in the complaint filed before the Court of the Judicial Magistrate, Melur as Door No.10, Kathapillai Street, Melur-625106. It is pertinent to note that the present suit was pending at that time as service pending after the return of suit summons as “no residence”.

16. It is not the case of the revision petitioner that she has taken fresh summons to the address shown in the FIR i.e., Melur address and she



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has not offered any reason or explanation for not taking summons to the said address. But on the other hand, she has chosen to get orders for substitute service and effected paper publication.

17. As already pointed out, it is the specific case of the respondents that after cancelling the power deed executed in favour of the first defendant, they have defended the suit in O.S.No.1327 of 2003 filed by one Duraisamy and that the said suit was dismissed on 31.10.2012. As rightly contended by the learned counsel appearing for the second respondent, when the respondents were defending another suit for the very same relief for the very same property before the same Court, there was absolutely no reason for them either to evade the suit summons or avoiding in participating the suit proceedings. Even according to the revision petitioner, the suit property was owned by the respondents, then there is absolutely no reason for them to shy away from facing the suit proceedings.

18. The revision petitioner, in an attempt to prove her stand that the respondents were aware of the suit proceedings in the year 2008 itself, has



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filed a petition for reception of additional evidence under Order 41 Rule 27 C.P.C. in C.M.P.(MD)No.1801 of 2024.

19. In the affidavit filed in support of the above petition, the revision petitioner has stated that the respondents gave a complaint to the Melur Police Station, Superintendent of Police and District Collector on 27.07.2007, that the revision petitioner appeared before the Inspector of Melur Police Station for enquiry and also produced the plaint filed in O.S.No.288 of 2007, that at the enquiry, the second respondent gave a letter to the Inspector stating that she had the knowledge of the civil suit pending and she would proceed in the said suit for the relief claimed in the complaint and the said letter was counter signed by the Inspector of Melur Police Station, that the said letter given by the second respondent before the Melur Police Station was not filed before the trial Court, that the revision petitioner gave the copy of the letter received from the police station to the trial Court counsel, but by mistake he misplaced the said letter, that while the revision petitioner was verifying the papers recently, she found xerox copy of the letter dated 30.07.2007 and handed over the same to the present counsel and that therefore, the said document has to be received as additional evidence.



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20. It is pertinent to note that the revision petitioner, in the affidavit itself, has stated that she is taking steps to get a certified copy of the letter dated 30.07.2007, but till the completion of the arguments in the present revision petition, she has not chosen to produce the certified copy. The revision petitioner has not offered any acceptable reason or explanation for non-producing the said document before the trial Court. Moreover, since the revision petitioner has only produced the xerox copy and the same is specifically disputed by the other side, in the absence of certified copy, the same cannot be received in evidence. Viewing from any angle, the revision petitioner has not made out any case for reception of additional evidence and as such, the petition is liable to be dismissed.

21. As already pointed out, admittedly, suit summons were not served on the respondents. Though the revision petitioner has taken a stand that the respondents were having knowledge about the suit proceedings in the year 2008 itself, she has not produced any iota of evidence or material to substantiate the same.

22. As rightly observed by the learned trial Judge, the revision



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petitioner has entered into a sale agreement with the first defendant, who was the then power agent of the respondents.

23. The learned counsel appearing for the revision petitioner has also taken a stand that even assuming for arguments sake that the respondents came to know about the *ex parte* decree only on 25.03.2013, they ought to have filed the application under Order 9 Rule 13 C.P.C. within a period of one month from the date of their knowledge, but they have filed the above application only on 29.06.2013 and as such, the same is barred by time.

24. But the respondents, in their affidavit filed in support of the application filed under Order 9 Rule 13 C.P.C., have specifically stated that they have filed an application on 17.04.2013 within one month from the date of their knowledge under “A” number 11908, but the said application was misplaced by the Court office and that since they could not trace out the same, they were forced to file the present application. As rightly contended by the learned counsel appearing for the second respondent, the revision petitioner, in the counter statement, has not



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specifically disputed the said factum. It is not the specific case of the revision petitioner that the respondents have not filed any application on 17.04.2013 under “A” number 11908 before the Subordinate Court office as claimed by them.

25. According to the respondents, they have filed the application in time, but that was misplaced by the Court office. Even assuming that no such application was filed as alleged by them, there was a delay of three months which includes summer vacation.

26. The Hon'ble Supreme Court in the case of ***Sesh Nath Singh and another Vs. Baidyabati Idyabati Sheoraphuli Co-operative Bank Limited and another*** reported in ***L.L.2021 SC 177 (Civil Appeal No.9198 of 2019), dated 22.03.2021.***, has specifically observed that there is no bar to exercise by the Court of its discretion to condone delay, in the absence of a formal application to condone the delay and the relevant passages are extracted hereunder :

“ 61. The condition precedent for condonation of the delay in filing an application or appeal, is the existence of



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sufficient cause. Whether the explanation furnished for the delay would constitute 'sufficient cause' or not would dependent upon facts of each case. There cannot be any straight jacket formula for accepting or rejecting the explanation furnished by the applicant/appellant for the delay in taking steps. Acceptance of explanation furnished should be the rule and refusal an exception, when no negligence or inaction or want of bona fides can be imputed to the defaulting party.

62. It is true that a valuable right may accrue to the other party by the law of limitation, which should not lightly be defeated by condoning delay in a routine manner. At the same time, when stakes are high, the explanation should not be rejected by taking a pedantic and hyper technical view of the matter, causing thereby irreparable loss and injury to the party against whom the lis terminates. The courts are required to strike a balance between the legitimate rights and interests of the respective parties.

63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make



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a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the Court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under



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Section 5 of the Limitation Act as of right, without making an application.”

27. Considering the above facts and circumstances, this Court is also of the view that the respondents should be given an opportunity to prosecute the suit and as such, the impugned order allowing the application filed under Order 9 Rule 13 C.P.C. cannot be found fault with. But at the same time, this Court is of the view that the cost imposed by the trial Court is on lesser side.

28. In view of the above, the application in I.A.No.433 of 2013 will be allowed on payment of additional cost of **Rs.10,000/- (Rupees Ten Thousand only)** to the revision petitioner on or before 21.06.2024, failing which, the application shall stand dismissed automatically. In case of allowing the application in I.A.No.433 of 2013, the respondents are hereby directed to file their written statement within 10 days from 21.06.2024 and thereafter, the trial Court is directed to frame necessary issues and proceed with the trial and dispose of the suit as expeditiously as possible preferably within a period of four months thereafter.



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29. With the above direction, this Civil Revision Petition is disposed of. Consequently, C.M.P.(MD)No.1801 of 2024 is dismissed and the other connected Miscellaneous Petition is closed.

04.06.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
csm

Note : Issue order copy on 12.06.2024

To

1. The Principal Subordinate Judge,
Madurai.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

csn

Pre-Delivery Order made in
C.R.P.(MD)No.1384 of 2018
and
C.M.P.(MD)Nos.5986 of 2018 and 1801 of 2024

Dated : 04.06.2024