

S.Kamalam Vs. Rajamani

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Court : Chennai

Decided On : Jun-04-2014

Judge : P.R.Shivakumar

Appellant : S.Kamalam

Respondent : Rajamani

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

04. 06.2014 C O R A M THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR
C.R.P.(NPD) No.1637 of 2009 S.Kamalam ... Petitioner Vs. Rajamani ...
Respondent Civil Revision Petition filed under Section 115 of the Code of Civil
Procedure to set aside fair and final order of District Munsif, Dharapuram dated
15.04.2009 made in I.A.No.328 of 2009 in I.A.No.1395 of 2008 in O.S.No.95 of
2007. For Petitioner : Mr.B.Dyaneswaran For Respondents : Mr.N.Srinivasan

ORDER

The first defendant in O.S.No.95/2007 on the file of the District Munsif Court,
Dharapuram has filed this civil revision petition questioning the correctness and
legality of the fair and final order dated 15.04.2009 made in I.A.No.328/2009 in
I.A.No.1395/2008 in the above said original suit dismissing the said interlocutory
application.

2. The respondent herein had filed the suit against the petitioner herein and her minor daughters Jeevitha and Karthika for the relief of partition and separate possession, claiming = share in the suit properties. Initially, the petitioner herein, who figured as the first defendant in the suit and who was said to be the guardian of the minor defendants 2 and 3, contested the suit by filing a written statement contending that the respondent herein/plaintiff was entitled to th share alone and that the remaining th share belonged to the defendants in the suit. However, when the suit stood listed for trial on 03.12.2008, the defendants did not appear and an ex-parte order setting them ex-parte came to be passed by the trial court. Hence the petitioner in the revision/first defendant filed an application in I.A.No.1395/2008 under Order IX Rule 7 CPC to set aside the order dated 03.12.2008 setting her ex-parte and to permit her to contest the case. In the said application, a conditional order was passed by the trial court on 10.12.2008 allowing the said application on condition that the petitioner therein should pay a sum of Rs.200/- as cost to the respondent therein/plaintiff on or before 23.12.2008. As the said cost was not paid on or before the said date, I.A.No.1395/2008 came to be dismissed on 23.12.2008.

3. Contending that the revision petitioner was laid up with jaundice from 15.12.2008 and was taking siddha treatment and the same disabled her from meeting her counsel to know about the fate of the case and that only after recovery on 06.04.2009, she could meet her counsel to know that her application I.A.No.1395/2008 had been dismissed for non-compliance with the condition directing payment of Rs.200/- as cost on or before 23.12.2008, the petitioner had filed I.A.No.328/2009 under Sections 148 and 151 CPC for extension of time for payment of the cost awarded in I.A.No.1395/2008.

4. The said petition was resisted by the respondent herein contending that the revision petitioner/first defendant did allow the application I.A.No.1385/2008 to be dismissed for default without complying with the condition regarding payment of cost incorporated in the order dated 10.12.2008, with a view to protract the proceedings and that the reason assigned by the revision petitioner as if she had been laid up with jaundice from 15.12.2008 to 06.04.2009 and was taking siddha treatment was only imaginary and invented to support of the prayer made in the

application seeking extension of time. Based on the above said contentions, the respondent prayed for dismissal of the said application.

5. The learned District Munsif, Dharapuram, after hearing, dismissed the said application by the impugned order dated 15.04.2009 holding that the revision petitioner herein was negligent and inactive and that the prayer made by the revision petitioner herein for extension of time was not bonafide. The correctness and legality of the said order is questioned in the present revision preferred under Section 115 of CPC.

6. Notice before admission was given and the respondent has entered appearance through counsel. The arguments advanced by Mr.B.Dyaneswaran, learned counsel for the revision petitioner and by Mr.N.Srinivasan, learned counsel for the respondent were heard. The copy of the impugned order and the documents produced in the form of typed set of papers were also perused.

7. The first defendant in the original suit before the trial court is the petitioner herein. The suit is one for partition filed by the respondent herein claiming = share in the suit properties. According to the plaint allegations, the suit properties were the ancestral properties and self-acquired properties of Sivanmalai Gounder, who died intestate as a member of Hindu Undivided Family on 25.05.2004 leaving behind him his wife Venkitammal, son Chellamuthu and daughter Rajamani (the respondent herein/plaintiff). Contending further that on the death of Venkitammal on 11.09.2006, she became entitled to half share of the properties left by Sivanmalai Gounder, whereas the defendants, the legal heirs of Chellamuthu, who died on 06.03.2005, became entitled to the other half.

8. The suit was resisted by the defendants therein by filing a written statement contending that, Sivanmalai Gounder and Chellamuthu were the coparceners regarding the suit properties; that on the death of Sivanmalai Gounder, his half share devolved on his widow Venkitammal, son Chellamuthu and daughter Rajamani; that each one of the above said three persons became entitled to 1/3rd share out of the half share of Sivanmalai Gounder and thus Venkitammal and Rajamani became entitled to 1/6th share each in the suit properties, whereas Chellamuthu became entitled to 4/6th share; that on the death of Venkitammal her

1/6th share devolved equally on the respondent/defendant Rajamani on the one hand and the legal heirs of Chellamuthu on the other hand and that thus Rajamani became entitled to $\frac{1}{6} + \frac{1}{12} = \frac{3}{12}$ = th share alone whereas the remaining th share belongs to the defendants, namely legal heirs of Chellamuthu.

9. It is an admitted fact that the defendants had chosen to contest the case by filing a written statement containing the above said averments. However, when the suit stood listed for trial on 03.12.2008, the revision petitioner, who was defending the case for herself and also as guardian of her minor daughters, was not present and the trial court chose to pass an order setting her ex parte and directing that the trial of the suit would be proceeded ex parte. Before the disposal of the case, the revision petitioner chose to file I.A.No.1395/2008 under Order IX Rule 7 CPC praying for an order setting aside the order dated 03.12.2008 by which the defendants were set ex-parte and thereby permitting them to contest the suit based on their written statement already filed. The learned trial judge chose to allow the said application by an order dated 10.12.2008 on condition that the petitioner therein should pay a sum of Rs.200/- as cost to the respondent therein (the respondent in the present revision) on or before 23.12.2008. Admittedly, the said condition was not complied with on or before the above said date and no application for extension of time came to be filed within that time, which resulted in an order dated 23.12.2008 dismissing the said application I.A.No.1385/2008. Thereafter I.A.No.328/2009 came to be filed under Sections 148 and 151 of CPC praying for an order extending the time granted by the trial court in its conditional order dated 10.12.2008 made in I.A.No.1395/2008 on the premise that she was laid up with jaundice and was taking siddha treatment from 15.12.2008 to 06.04.2009,. The petition was resisted by the respondent herein (plaintiff) simply denying the averments made in the affidavit filed in support of the petition and contending that the revision petitioner had chosen to act with the intention of protracting the case. The learned trial judge relying on the decision made in 2006(3) CTC418[Gowriammal vs. Murugan and others]. and 2006(5) CTC233[Jothi Anand vs. Amirtha Raj]. has held that the court does not become functus officio after the dismissal of the application for the failure to comply with the conditional order and that even after the dismissal of the application, the court has power to extend time. However, the learned trial Judge held that such power

could be exercised only on proof of the contention that the petitioner seeking extension of time was not guilty of negligence or inaction and that the petition seeking extension of time was a bonafide one. Based on the said observation, the learned trial judge held that the petitioner was inactive and negligent and the petition for extension of time was not a bonafide one. In line with the said finding, the trial court dismissed the petition I.A.No.328/2009 by the impugned order dated 15.04.2009.

10. There is no controversy regarding the proposition of law that even after the expiry of the time granted in the conditional order, the court does not become functus officio and in appropriate cases, the court can condone the delay, if the circumstances so warrant. This was held so in *Gowriammal vs. Murugan and others* reported in 2006 (3) CTC418 decided by a Division Bench of this court, when the question of law had been referred to the Division Bench by a learned single judge. The Division Bench relying on the view expressed by the Apex Court in *Salem Advocates Bar Association, Tamil Nadu vs. Union of India* reported in 2005 (6) SCC344 wherein the Honble Supreme Court had held that the court which passed the conditional order, could invoke both the sections, namely 148 and 151 of CPC to condone the delay, if the circumstances would so warrant. However, the learned trial judge has chosen to dismiss the application holding that the petitioner was negligent and inactive in prosecuting the case and that there was no bona fide in her petition seeking extension of time for payment of the meagre sum of Rs.200/- awarded as cost.

11. Learned counsel for the revision petitioner would contend that the finding of the court below that the petitioner was negligent and inactive and there was no bona fide on her part in filing the application for extension of time was perverse and that hence the same should be interfered with by this court in exercise of its power of revision. It is the further contention of the learned counsel for the revision petitioner that the trial court failed to note that a defendant, who has been set ex-parte, shall have a right to participate in the proceedings for which no petition seeking an order setting aside the order by which he/she was set ex-parte is needed and that such a petition under Order IX Rule 7 CPC shall be needed only in order to restore the status quo ante and place the defendant in the position in

which he/she was before the order setting such defendant ex-parte was passed.

12. There is substance in the above said contention raised by the learned counsel for the revision petitioner. The rules under Order IX CPC deal with the situation wherein one or more of the parties or all the parties failed to contest the case or remain absent on the date fixed for hearing. Order IX Rule 2 CPC enables the court to dismiss the suit on the failure of the plaintiff to pay the court fee and postal charges, if any, for the service of summons on the defendants with a rider that if the defendant appears notwithstanding such failure on the part of the plaintiff, a suit cannot be dismissed. Order IX Rule 3 is to the effect that in case both the plaintiff and the defendant fail to appear on the date of hearing, the suit may be dismissed. Rule 4 of Order IX CPC deals with the restoration of the suit dismissed for default under Rule 2 or Rule 3 of the said Order. Similar is the provision in Rule 5 which enables the court to dismiss the suit for the failure of the plaintiff to apply for fresh summons after the summons issued to the defendant has been returned unserved. Order IX Rule 6 deals with procedure to be adopted by the court when the plaintiff appears and the defendant does not appear. If summons have been duly served in time and the defendant does not appear, whereas the plaintiff appears, the court can make an order that the suit be heard ex-parte. Order IX Rule 7 says that if the court has adjourned the hearing of the suit after passing an order to hear the suit ex-parte, the defendant may appear at or before such hearing on the adjourned date and assign cause for his previous non-appearance, in which event, the defendant can be heard in answer to the suit as if he had appeared on the day fixed for his appearance upon such terms as to cost or otherwise.

13. The said provision has been interpreted in a catena of cases that no petition under Order IX Rule 7 CPC is necessary for a defendant to take part in the proceedings from the date of his appearance, if he does not seek restoration of the status quo ante placing him in the position as if he had appeared on the earlier date on which he failed to appear pursuant to which the order for hearing the suit ex-parte came to be passed. If the defendant had not filed the written statement, he may appear in the ex-parte trial and even cross-examine the witnesses to be examined on the side of the plaintiff on the averments made in the plaint, but shall not be permitted to project a plea of defence, which ought to have been taken in

the written statement. Having not filed any plea of defence, he shall be disabled from examining the witnesses on his side. On the other hand, if he had already filed a written statement raising his plea of defence and on a subsequent date of hearing, he fails to appear resulting in an order passed under Order IX Rule 6(a) CPC to the effect that the suit will be heard ex-parte, then such a defendant cannot be prevented from taking part in the proceedings from the subsequent date of hearing on which he may chose to appear. In such cases, if the recording of evidence had not begun, then he shall be in a position to fully participate in the proceedings. If at all the witnesses have been examined and documents have been marked without an order under Order IX Rule 7 CPC, he cannot get the recording of depositions and the marking of documents in his absence nullified and in such cases he can take part in the proceedings from the time he chooses to appear without seeking restoration of the status quo ante.

14. In the case on hand, though an order came to be passed on 03.12.2008 setting the defendants exparte connoting that the suit would be heard ex-parte, admittedly no evidence was recorded till the petitioner chose to enter appearance by filing an application under Order IX Rule 7, namely I.A.No.1395/2008. Even without such an application, the revision petitioner could have taken part in the proceedings. This aspect was not properly considered by the court below. However, the trial court chose to allow the said application imposing a nominal cost of Rs.200/- to be paid as a condition for allowing the said application. The revision petitioner failed to comply with the condition within the time stipulated in the order dated 10.12.2008. However, the petitioner has come forward with an application in I.A.No.328/2009 in April 2009 with an explanation that she had been laid up with jaundice from 15.12.2008 to 06.04.2009 and the same was the reason for the lack of communication with her counsel, which also resulted in the default in payment of the cost. Along with the petition, the revision petitioner also filed a lodgment schedule for depositing of the cost awarded in I.A.No.1385/2008. The learned trial judge could have taken a lenient view and permitted the revision petitioner to take part in the proceedings, while directing payment of compensation by way of cost for the delay caused. But the learned trial judge has chosen to dismiss the petition holding that there was no bona fide in it.

15. Learned counsel for the revision petitioner pleaded for the indulgence of this court and prayed that the impugned order of the trial court dated 15.04.2009 might be set aside. It is also the submission made by the learned counsel for the petitioner that the petitioner is prepared to part with a reasonable amount that may be fixed by this court as cost. The learned counsel for the respondent also has submitted that the respondent may not have serious objection, provided cost is awarded. Considering the fact that the suit is still pending and the defendants, who were set ex-parte had already filed their plea of defence and that hence they can take part in the subsequent proceedings even without an order under Order IX Rule 7 CPC, this court comes to the conclusion that the revision shall be allowed, the impugned order of the trial court shall be set aside and at the same time, the respondent shall be compensated with a cost of Rs.5,000/-. For all the reasons stated above, the civil revision petition is allowed. The order of the trial court dated 15.04.2009 dismissing I.A.No.328/2009 is set aside. I.A.No.328/2009 shall stand allowed and the time for payment of cost awarded in I.A.No.1395/2008 by the conditional order dated 10.12.2008 shall stand extended by one month from the date of this order. In addition, the petitioner shall pay a sum of Rs.5,000/- as cost to the respondent. The trial court shall take up the trial of the suit and dispose of the suit as expeditiously as possible, in any event, not later than six months from the date of receipt of a copy of this order. 04.06.2014 Index : Yes Internet : Yes asr/- To The District Munsif, Dharapuram P.R.SHIVAKUMAR, J.

asr

ORDER

IN C.R.P.(NPD) No.1637 of 2009 Dated :

04. 06.2014

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