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Court : Chennai

Decided On : Dec-08-2016

Judge : M.V. Muralidaran

Appeal No. : CRP(NPD)NO. 4036 of 2012 & M.P.No. 1 of 2012

Appellant : Krishnappa

Respondent : Govindarajan

Judgement :

(Prayer:Civil Revision Petition filed under Section 115 of C.P.C. against the Fair and Decreetal orders of the Subordinate Judge of Hosur, dated 29.06.2012 in I.A.No.422 of 2011 in O.S.No.11 of 2007.)

1. The defendant in O.S.No.11 of 2007 is the revision petitioner before this Court.
- 2.This Civil Revision Petition has been filed against the order of the dismissal of the condone delay of 2 years, 3 months and 9 days filed under Section 5 of the Limitation Act in filing the application to set aside the exparte decree under Order 9 Rule 13 of Civil Procedure Code.
3. The case of the petitioner/defendant is that the suit has been filed by the respondent/plaintiff in O.S.No.11 of 2007 before the learned learned Sub-Judge, Hosur, for specific performance.

4. The case of the petitioner is that this petitioner/defendant have executed agreement of sale on 14.09.2006 in favour of the plaintiff agreeing to sell the schedule mentioned property for total sale consideration of Rs.2,94,000/- and in pursuance of the sale agreement, this petitioner/defendant has received the advance amount of Rs.1,00,000/- from the plaintiff in the presence of witnesses and agreed to receive the balance sale consideration amount of Rs.1,94,000/- within stipulated period of three months time from the date of agreement and also agreed to execute and register the sale deed within the stipulated period and receive the balance sale consideration amount from the plaintiff.

5. The plaintiff also states that the defendant has agreed to execute to register the sale deed on receipt of the balance amount, but he failed to comply the same. Hence, he has approached the learned Sub-Judge, Hosur and filed the suit under Order VII Rule 1 to 6 of C.P.C. against this petitioner/defendant for specific performance.

6. Denying the averments made in the plaint, this petitioner/ defendant has filed a written statement by stating that it is an admitted fact that the suit agreement was executed by this petitioner/defendant by receiving a sum of Rs.1,00,000/- as an advance and when the cheque was encashed, the respondent/plaintiff got back Rs.25,000/- from this petitioner/defendant at the very gate of the Bank itself. The defendant also states that this defendant and one Gangammal are jointly possession and enjoyment of the suit property and suppressing the market value of the suit property, and entering the agreement in a low price by hoodwinking this defendant.

7. The defendant also states that though the property was stand in the name of the defendant's wife Gangammal and the Gangammal should also execute the agreement, since there is an agreement between them. But, the plaintiff said that he will get consent of Gangammal in no time. Though, the suit property will fetch Rs.39,00,000/- at present. But, he fraudulently obtained the sale agreement for a sum of Rs.2,94,000/-.

8. The plaintiff has prayed the fraudulent of the defendant and has filed a suit in O.S.No.11 of 2007 before the Court concerned and the same is pending.

Therefore, he stated that the sale agreement is not valid and sought for dismissal of the suit.

9. Though the suit was posted in the list for evidence on 11.07.2009, but the suit was decreed ex parte on the ground that this defendant and his counsel were not appeared before the Court and there was also no representation on behalf of the defendant.

10. This petitioner/defendant also states that though the learned counsel appearing for the petitioner/defendant unfortunately sent a letter to the respondent, but the same was not reached to this petitioner/defendant.

11. The petitioner also come forward by saying that he was also suffering from Jaundice and taking native treatment for some period about one year and later on he returned back to house only after 1 years. Therefore, he could not attend the Court on 01.07.2009 and on the same day, the trial Court namely Sub-Court, Hosur, decreed the suit ex parte. Therefore, this petitioner after came to know only after 1 years, he has approached his counsel and filed the set aside application along with condone delay of 2 years 3 months and 9 days. The petitioner/defendant has prayed the Court for allowing the I.A.No.422 of 2011 by condoning the delay of 284 days.

12. On receipt of the notice, the respondent/plaintiff has filed a counter affidavit. In the counter affidavit, the respondent/plaintiff has denied all the allegations set out by the petitioner/defendant.

13. The respondent/plaintiff also denied that the letter sent by the petitioner's advocate was not reached to the respondent is totally false and also denied about the treatment taking for Jaundice for a period of 1 years.

14. The respondent/plaintiff has come forward by saying that originally the suit was filed on 05.02.2007 and the petitioner/defendant had also contested the suit after engaging the counsel and also filed a written statement in the suit. Though, the suit was posted on 09.09.2008 in the special list, either the defendant or his counsel have not appeared before the Court. Hence, he was set ex parte and

exparte decree was passed in favour of the respondent/ plaintiff, on the same day.

15. After the decree obtained by the respondent/plaintiff, he has also deposit the entire balance sale consideration amount before the trial Court namely the Sub-Court, Hosur, as per the direction of the said Court. At this juncture, this petitioner/defendant has filed the condone delay application, along with the set aside application, filed in I.A.No.62 of 2009 for condoning the delay of 86 days and the same was allowed by the learned Sub-Judge, Hosur and the other application in I.A.No.435 of 2009 filed under Order 9 Rule 13 CPC was also allowed and thereafter, the said suit was posted on 10.06.2010. But, this petitioner/defendant again absented himself on 10.06.2010, hence the suit was again decreed in favour of this respondent.

16. Thereafter, the respondent also filed an Execution Petition before the same Court in R.E.P.No.69 of 2011 for Execution of the Sale Deed and on receipt of the notice in the E.P. proceedings, this petitioner/ defendant filed an application for setting aside the exparte decree for the second time along with the condone delay petition for condoning the delay of 2 years 3 months and 9 days.

17. The respondent also states that only to drag on the proceedings with wasting of the Court time, the petitioner has filed one another application for setting aside the exparte decree. Therefore, he prayed the trial Court to dismiss the application filed in I.A.No.422 of 2011 for condoning the delay of 284 days in filing the application under Order 9 Rule 13 of CPC.

18. On considering the argument of the either parties, the learned Sub-Judge, Hosur was pleased to dismiss the application for condone the delay filed by the petitioner/defendant on the ground that on the first occasion on 11.07.2009, this petitioner/defendant has not appeared before the Court. Hence, he was set exparte and later on this petitioner/defendant has filed an application in I.A.No.62 of 2009 for condoning the delay of 86 days and I.A.No.435 of 2009 filed under Order 9 Rule 13 of CPC for setting aside the exparte decree dated 11.07.2009. But, on the second occasion, the petitioner/defendant has not appeared and hence he was set exparte on 11.07.2009 and hence exparte decree was passed. The second time, this petitioner/ defendant has filed the present application in

I.A.No.422 of 2011 in O.S.No.11 of 2007 for condone the delay of 284 days delay in filing the set aside application under Order 9 Rule 13 CPC. Therefore, citing the judgment rendered by this Court in Ranganatha Iyengar Vs. Thangarasu, reported in 2009 (1) TNCJ 130 the learned Judge dismissed the application. Challenging the said order, this petitioner has come before this Court by way of the above Civil Revision Petition.

19. I heard Mr.Nicholas, learned counsel appearing for the petitioner and Mr.G.M.Anandha kumar, learned counsel appearing for the respondent.

20. During the course of arguments, the learned counsel appearing for the petitioner produced a judgment rendered by the Hon'ble Division Bench of this Court reported in 2011 (3) CTC 168 (Meenakshisundaram Textiles v. Valliammal Textiles). Even the defendant is set exparte, the Court should be extra careful in such case and it should consider pleading to arrive at a finding as to whether the plaintiff is entitled to a decree and exparte decree should show minimum requirements of the consideration of pleadings and evidence.

21. Per contra, the learned counsel appearing for the respondent has produced unreported judgment rendered by this Court in CRP(NPD).Nos.4252 and 4256 of 2009 (Saradhamani and others v. V.Sankar and others), it is held as follows:

13. There is no dispute with regard to the ratio laid down by the Apex Court in the judgments relied upon by the learned counsel for the petitioners. However, when the petitioners have not explained the reasons for the delay in a proper manner, the delay cannot be condoned. As already stated, when the petitioners have stated that they had the knowledge of the dismissal of the suit and the exparte decree passed in the suit only on 11.07.2008, the said averment can only be a false averment for the reason that the petitioners have filed applications for return of the documents as early as on 09.07.2008 itself and the present applications for condonation of the delay were filed on 29.07.2008. Further, the contention with regard to the alleged compromise was also not proved by the petitioners by examining the alleged relatives and the Panchayadars, who had compromised the dispute between the parties.

22. On considering both judgments produced by both the parties, the Hon'ble Division Bench has made clear that the trial Court has consider the pleadings and evidence to arrive at a findings as to whether the plaintiff is entitled to a decree or not, since the exparte decree cannot be shown, the application is minimum requirements of the consideration of pleadings and evidence.

23. It is admitted fact that the petitioner already on first occasion set exparte on 09.09.2008 for that this petitioner/defendant also filed an application in I.A.No.62 of 2009 for condoning the delay and I.A.No.432 of 2011 for setting aside the exparte decree and both the applications were allowed by the learned Sub-Judge, Hosur.

24. But, the second time, the defendant was set exparte on 11.07.2009 and exparte decree was passed. Challenging the exparte decree, this petitioner/defendant has filed the present application in I.A.No.422 of 2011 for condoning the delay of 284 days in filing the set aside applications.

25. Admittedly, the suit was filed for specific performance based on the alleged sale agreement dated 14.09.2006. The question of alleging execution of sale agreement and the sale proceedings to be decided only on merits, since the trial Court should have gone through that whether the sale agreement dated 14.09.2006 was really executed by the petitioner/defendant or not and also the trial Court has decided in other aspects in respect of the Execution of sale agreement. But, for the second time, this petitioner/defendant has approached the trial Court for setting aside the exparte decree with condonation of delay is lawful right should not be curtail. If the judgment and decree has been passed in the main suit on merits that would be helpful for both the parties. But, merely because of the non appearance of the defendant, the trial Court also without passing the judgment and decree on merits, ought not to have dismiss the condone delay application for setting aside the exparte decree.

26. Whether the defendant is innocent or the plaintiff is innocent and the validness of the execution of the sale agreement dated 14.09.2006 should be decided only on merits by recording the evidence by marking the documents by both parties by the trial Court. Thereafter, only the said genuineness of the sale agreement will be

decided. Therefore, in the interest of justice, it is just and necessary by giving one more opportunity to the petitioner/defendant, this petition for condone the delay must be allowed.

27. But, the petitioner/defendant should compensate the respondent/plaintiff by way of paying the cost since he has approached the trial Court on the second time. Accordingly, I am inclined to pass the following orders:

(a) this civil revision petition is allowed by setting aside the order passed in I.A.No.422 of 2011 in O.S.No.11 of 2007, dated 29.06.2012, on the file of the Subordinate Judge, Hosur, on condition that the petitioner should pay a sum of Rs.5,000/- as costs either to the respondent/plaintiff or his counsel within a period of three weeks from the date of receipt of a copy of this order.

(b) the trial Court namely the Subordinate Judge, Hosur, is hereby directed to number the set aside application by giving notice to the respondent/plaintiff and decide the said application within a period of one month;

(c) thereafter, on deciding the set aside application, the trial Court is directed to expedite the trial of the suit in O.S.No.11 of 2007 and dispose the same within a period of three months without giving any adjournment to either parties on day today basis and both the parties are hereby directed to co-operate for the early disposal of the suit.

28. In the result, the civil revision petition is allowed with costs. Consequently, connected miscellaneous petition is closed.

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