S. Muthukumar Vs. M. Pari

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Court : Chennai

Decided On : Mar-30-2015

Judge : The Honourable Mrs.Justice Pushpa Sathyanarayana

Appellant : S. Muthukumar

Respondent : M. Pari

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

30. 3.2015 CORAM THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA C.R.P.NPD (MD) Nos.858 of 2013 and 898 of 2013 S. Muthukumar ... Petitioner in both the petitions Vs M. Pari ... Respondent in both the petitions. Prayer in C.R.P.NPD (MD) No.858 of 2013:- Petition filed under Section 115 of the Code of Civil Procedure against the order dated 8/4/2013 passed in E.A.No.26 of 2011 in E.P.No.10 of 2010 in O.S.No.142 of 2001 on the file of the Sub-Court, Paramakudi. Prayer in C.R.P.NPD (MD) No.858 of 2013:- Petition filed under Section 115 of the Code of Civil Procedure against the order dated 8/4/2013 passed in I.A.No.114 of 2011 in O.S.No.142 of 2001 on the file of the Sub-Court, Paramakudi. !For petitioner ... Mr.AR.L.Sundaresan Senior Counsel for Mr.G.Gomathi Shankar For respondent ... Mr.G.R.Swaminathan :COMMON

ORDER

Civil Revision Petition (MD) No.898 of 2013 is filed by the defendant against the order passed in I.A.No.114 of 2011 refusing to condone the delay of 3083 days in setting aside the ex parte order.

2. The parties will be referred as per their status in the suit.

3. O.S.No.142 of 2001 was filed by the plaintiff for the relief of specific performance. The said suit was posted for the filing of the written statement of the petitioner herein on 2/9/2002. As he had not filed the written statement, he was a set ex parte on the same date.

4. According to the defendant, he was running a financial institution in the name and style of 'Venkateshwara Chit Funds'. The said institution resulted in loss and the defendant had to issue cheques and pronotes in favour of the sharers. The plaintiff had forged the signature of the plaintiff and created the suit sale agreement. The defendant had moved out of Paramakudi and came to Chennai in search of employment as he could not continue with the business which ended up in loss. The suit notice was served to Paramakudi address where the defendant was not living for the last ten years. Therefore, the defendant could not come back immediately to file the written statement or set aside the ex parte decree. In the process, there was a delay of 3083 days.

5. The plaintiff resisted the said application and denied all the averments stated in support of the condonation of delay. According to the plaintiff, he had paid Rs.4,20,000/- towards sale consideration out of Rs.4,25,000/-. There was only Rs.5,000/- outstanding to be paid on execution of the sale deed. As the defendant was evading the execution of the sale deed, the suit in O.S.No.183 of 1999 was filed on the file of the Sub-Court, Ramanathapuram. In the said suit, the defendant appeared through his counsel K.Nagarajan and K.Senthur on 24/9/1999. His counsels also took several adjournments for filing the written statement. Later, the suit was transferred to the Sub-Court, Paramakudi and renumbered as O.S.No.142 of 2001. Even before the said Court, the learned counsel for the defendant Mr.K.Senthur, appeared and has filed a memo on behalf of the defendant. Again before the Sub-Court, Paramakudi, several opportunities were given to the defendant to file the written statement which were not obliged by the

defendant and he was finally set ex parte on 2/9/2002.

6. Pursuant to the ex parte decree, the plaintiff had filed E.P.No.4 of 2004 in which also notice was sent to the defendant. As the defendant refused to receive the notice in Execution Petition, he was set ex parte in E.P also. In the meanwhile, one Krishnan had filed a suit against the defendant in O.S.No.203 of 1999 on the file of the Sub-Court, Ramanathapuram. In the said suit, the defendant once again appeared through his counsels K.Nagaraj and Senthur. However, the defendant was set ex parte there also on 7/8/2000 and a decree was passed against him. The said decree holder Krishnan had filed E.P.No.12 of 2003. In the said E.P.No.12 of 2003, the petitioner herein had filed a claim petition in E.A.No.49 of 2004. In all these applications and petitions, the defendant had entered appearance through counsel. Thereafter, the plaintiff herein and the plaintiff in O.S.No.203 of 1999 entered into a compromise. The plaintiff herein had settled the decree amount in O.S.No.203 of 1999 in favour of the decree holder Krishnan on behalf of the defendant. Based on which a Full Satisfaction Memo was filed in E.P.No.12 of 2003. After that the plaintiff herein had got the sale deed executed on 12/2/2010 and the same was registered on 17/2/2010. Based on the said sale, E.P.No.10 of 2010 was filed by the plaintiff for delivery of possession. In the said application also, notice was sent to the address of the defendant in Paramakudi. The notice was received by the defendant and he also filed his objections. Thereafter, despite several adjournments given to the defendant, he did not appear before the Court.

7. In the meanwhile, it was found that the defendant had taken a loan from Paramakudi Co-operative Housing Society by mortgaging the suit property. As the said loan was not discharged, the Society brought the said property for sale. Even at that time, the defendant had purchased the property in the name of his co-brother Benami, colluding with the officials of the Society. The said fact was made known to the plaintiff herein only a few months later. Immediately, the plaintiff had sent a notice to the Housing Society to cancel the said auction and offered to pay the loan amount in full quit. As there was no response, the plaintiff had deposited a sum of Rs.7,85,000/- with Paramakudi Co-operative Housing Society, based on the direction given by the District Registrar. While so, the defendant also filed

W.P.No.13287 of 2010 before this Court,through his co-brother. The plaintiff also has sought to implead himself in the said writ petition.

8. According to the plaintiff, the defendant and his family are living in the same address to which the notices were taken. The defendant also had suffered another decree in O.S.No.9 of 2004 at the instance of one Arockiam, who had filed the suit on mortgage deed. In the said suit also, a decree was passed and E.P was levied in E.P.No.41 of 2006. The said decree also ended in a compromise dated 9/4/2010. Therefore, the defendant had been taking part in all the proceedings through his counsel K.Senthur and observing from outside whatever has been happening in the Court. Knowing very well about the ex parte decree long back, the defendant has filed an application to set aside the same with a delay of 3083 days almost, after ten years which lacks bona fides.

9. The plaintiff also further submitted that he had spent more than a lakh of rupees towards Court fees, etc. He has spent about Rs.50,000/- for the execution of the sale deed. He has also settled the decree amount in O.S.No.203 of 1999. He also deposited Rs.7,85,000/- before the Co-operative Housing Society for the purpose of cancelling the auction. Accordingly, the plaintiff has spent several lakhs of rupees and being running from pillar to post spending his valuable time and energy to reap the fruit of the decree. In such a situation, the defendant has come up with this application to set aside the ex parte decree. Hence, there is no merits in the application filed by the defendant and the plaintiff prayed for the dismissal of the same.

10. The Sub-Court, Paramakudi who had tried the above application, after considering the documents and evidence filed on behalf of the parties, dismissed the I.A. Aggrieved by the same, the above Civil Revision Petition has been filed.

11. The only question that has to be decided is whether the delay of 3083 days should be condoned in setting aside the ex parte decree.

12. Admittedly, there is a delay of 8 + years in filing the application to set aside the ex parte decree by the defendant. The reason stated by him was that he suffered a loss in his business and had to be away from Paramakudi and was living as a

coolie in Chennai and Coimbatore. He was also not living with his family. Therefore, only after he received the notice in E.P.No.10 of 2010, he got the knowledge about the ex parte decree. Hence there was a delay.

13. But the contention of the plaintiff is that after the said suit by him was filed, there were several litigations against the defendant all in which the defendant had appeared through counsel and had knowledge about the said proceedings ending up in compromise at the intervention of this plaintiff. The defendant had knowledge about the decree even as early as in 2004, when E.P.No.12 of 2003 was filed in O.P.No.203 of 1999. The reason that he was living in Chennai and Coimbatore because of the loss in his business cannot be accepted as the said reason is not valid enough to condone the delay.

14. The defendant also had been prosecuting the subsequent litigations against him for recovery of money through his counsel. Therefore, the defendant cannot plead ignorance about the ex parte decree. In the evidence of P.W.1, he has stated that he came to knowledge about the judgment only six months prior to the filing of the application and that too he got to know only when his wife communicated the same to him over phone. He has not stated clearly as to when his wife informed him of the ex parte decree. Even otherwise, it has been categorically admitted by him that the delay application is filed three months after his wife had intimated about the passing of the ex parte decree.

15. The trial Court, refused to believe the version of the defendant that he was staying away from his wife. As from the above admission of P.W.1, it is clear that he had been having communication with his family. It is also not the case of the defendant that the address to which the notices were sent were not his address. Having appeared in the proceedings through counsel, he could have at least cared to enquire with his counsels about the pendency of the proceedings. Not stopping with that the plaintiff also had further stated in his evidence that the vakalats were filed by the Advocates by using the blank vakalats which have been signed by him and given to them earlier. But the trial Court, refused to believe the version of the defendant as none of his contentions appeared to be true. The trial Court also further found that he had admitted about the other proceedings excepting the

present suit. This leads to a doubt that the defendant was not bona fide in prosecuting his case.

16. The allegation of the plaintiff that the defendant was an actor and a film producer and that he has got enough resources to produce a feature film were also denied by the defendant. The vakalat filed by the defendant in various proceedings were also marked as Exs.C.1 and C.2.

17. On a over all consideration of the facts and evidence, the trial Court dismissed the petition to condone the delay.

18. The learned Senior Counsel Mr.ARL.Sundaresan appeared for the revision petitioner submitted that the judgment itself is not correct as the trial Judge had not framed any issue regarding the sale agreement and about its genuineness. In a suit for specific performance, it is mandatory to go into the question of readiness and willingness and the validity of the sale agreement. The trial Court had not even framed an issue in that regard and simply decreed the suit as prayed for.

19. It was submitted by the learned Senior counsel for the petitioner that the judgment passed by the trial Court is not a judgment at all within the definition of Section 2 (9) of the Code of Civil Procedure. Reliance was placed on 2011 (3) CTC ?. 168 (MEENAKSHI SUNDARAM TEXTILES, 1ST FLOOR, SONA TOWERS, 72 MILLERS ROAD, BANGALORE52 rep. BY ITS MANAGING DIRECTOR Vs. VALLIAMMAL TEXTILES LTD., No.50/1, AANDIPALAYAM, MANGALAM ROAD, TIRUPPUR), wherein in paragraph 6, it has been held as follows:- ?.In terms of the above provisions, every judgment should contain a concise statement of the case, the points for determination, decision thereon and the reasons for such decision. A judgment which does not contain the bare minimum facts, the point for determination, the evidence adduced and the application of those facts and evidence for deciding the issue would not qualify it to be called as ?.judgment?.. The judgment should contain the brief summary of the facts, the evidence produced by the plaintiff in support of his claim and the reasoning of the learned Judge either for decreeing the suit or its dismissal. The Civil Procedure Code does not say that the Court is bound to grant a decree in case the defendant is absent. Judgment means cognitive process of reading a

decision or drawing conclusion. Judgment is the basic requirement for a Court and it means a decision or conclusion reached after consideration and deliberation. To put it differently, the basics of a judgment are to support by most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived.?.

20. It was contended further that the Court should not act blindly on the averments made in the plaint merely because no written statement had been filed by the defendant. In the absence of written statement by the defendant, the Court should be little cautious in proceeding under Order 8 Rule 10 of the Code of Civil Procedure. The Court only on being satisfied that there is no fact which need be proved on account of deemed admission a judgment can be passed against a defendant. If the reading of the plaint indicates that there are disputed questions of fact, it is unsafe to pass a judgment without settling the factual dispute. The power under Order 8 Rule 10 of the Code of Civil Procedure is only discretionary for the Court.

21. The Supreme Court in SHANTILAL GULABCHAND MUTHA Vs. TATA ENGINEERING AND LOCOMOTIVE COMPANY LIMITED AND ANOTHER {2013 (4) SCC ?. 396}, wherein in paragraph 9, it has been held as follows:- ?.In view of the above, it appears to be a settled legal proposition that the relief under Order 8 Rule 10 CPC is discretionary, and Court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the Court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant, and the Court must must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the Court must proceed, and under what reasoning the suit has been decreed.?.

22. Now, examining the facts of the present case, it is a suit for specific performance. Unlike the other cases cited above, in this case, written statement was filed by the defendant before remaining ex parte. In the written statement, the agreement is denied by the defendant. Therefore, the trial Court at least ought to

have considered the truth and genuineness of the agreement. In a specific performance suit, the requirements that have to be proved are set out in Section 16 of the Specific Relief Act.

23. The learned Senior Counsel therefore, submitted that it is the duty of the Court to ensure the proof of the ingredients of a specific performance suit are established before a decree could be passed. Reliance was placed on AIR 1999 SC ?. 3381 {BALRAJ TANEJA AND ANOTHER Vs. SUNIL MADAN AND ANOTHER}, wherein in para 30, it has been held as follows:- ?.Applying these tests to the instant case, it will be noticed that in a suit for specific performance it is mandatorily required by Section 16 of the Specific Relief Act to plead readiness and willingness of the plaintiff to perform his part of the contract. The Court, before acting under Order 8 Rule 10 has to scrutinise the facts set out in the plaint to find out whether all the requirements, specially those indicated in Section 16 of the Specific Relief Act, have been complied with or not. Readiness and willingness of the plaintiff to perform his part of the contract is a condition precedent to the passing of a decree for specific performance in favour of the plaintiff.?.

24. Be that as it may. In the present case, I am not examining the issue as to whether such judgment and decree ex parte could be considered under Order 9 Rule 13 of the Code of Civil Procedure. It is in the stage of previous hurdle of law of limitation. If the Court is convinced about the acceptable explanation that the petitioner offered then the question of Order 8 Rule 10 would surface. In this case, the inordinate delay of 8 + years is not explained properly. The defendant had been lethargic and taken his own time to challenge the decree.

25. ?.Reipublicae up sit finis litium?. - the law of limitation is founded on public policy. It is for the general welfare that a period be put to litigation. Certainly, the rules of limitation are not meant to destroy the rights of parties. But the dilatory tactics adopted by one party should not put the opposite party to prejudice and peril. The lapse of time that too after more than 8 years should not be light heartedly disturbed.

26. No doubt, discretion vests with the Court if sufficient cause is shown. Even if sufficient cause is shown, the defaulters cannot seek for condonation as a matter

of right. The existence of 'sufficient cause' is only a condition precedent for the exercise of discretion.

27. To exercise discretion all relevant factors that are put forth by the defendant have to be considered. While analysing the said factors, the Court is bound to consider the bonafides of the defendant. From the conduct explained in the foregoing paragraphs, the dilatory tactics adopted by the defendant is ablaze. No doubt, Order 9 Rule 13 of the Code of Civil Procedure is a legal remedy open to the defendant. However, that legal remedy is also available to a party only for a specified period. As the defendant has crossed both the legislatively fixed period as well as the legitimately expected period and there is no acceptable cause or sufficient cause, the trial Court could not exercise the discretion in his favour. Having failed to avail the legal remedy promptly, the defendant has missed his opportunities. Therefore, this Court cannot entertain the submission made by the petitioner that Order 8 Rule 10 of the Code of Civil Procedure would have applicability when the first hurdle of delay had not been pleaded and proved with acceptable explanation.

28. For the aforesaid reasons, I feel there is no reason to interfere with the order passed by the trial Court and the Civil Revision Petitions deserve to be dismissed.

29. In the result, these Civil Revision Petitions are dismissed, confirming the orders dated 8/4/2013 passed in E.A.No.26 of 2011 in E.P.No.10 of 2010 in O.S.No.142 of 2001 and I.A.No.114 of 2011 in O.S.No.142 of 2001 on the file of the Sub-Court, Paramakudi. No costs. Consequently, the connected Miscellaneous Petitions are also dismissed. 30/3/2015 mvs. Index: Yes/No website: Yes/No To The Sub-Judge, Paramakudi. PUSHPA SATHYANARAYANA,J mvs. C.R.P.NPD (MD) Nos.858 and 898 of 2013 30/3/2015