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PushpalathA. Vs. Devaraj

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Court : Chennai

Decided On : Jul-30-2012

Judge : Aruna Jagadeesan, J.

Acts : Code of Civil Procedure,(CPC) 1908 - Order 13 Rule 9

Appeal No. : CRP(NPD)(MD)No.610 of 2012 MP.No.1/2012

Appellant : Pushpalatha

Respondent : Devaraj

Advocate for Def. : Mr.S.Meenakshi, Adv.

Advocate for Pet/Ap. : Mr.T.Arul, Adv.

Judgement :

Prayer This Civil Revision Petition is filed against the order dated 12.04.2006 made in CMA.No.13/2005 by the learned Subordinate Judge, Padmanabhapuram, confirming the order dated 3.10.2005 made in IA.No.376/2003 in OS.No.235/1999 by the learned Principal District Munsif, Padmanabhapuram.

ORDER

1. This Civil Revision Petition is filed against the order dated 12.04.2006 made in CMA.No.13/2005 by the learned Subordinate Judge, Padmanabhapuram,

confirming the order dated 3.10.2005 made in IA.No.376/2003 in OS.No.235/1999 by the learned Principal District Munsif, Padmanabhapuram.

2. The 1st Respondent herein as Plaintiff filed the suit in OS.No.235/1999 against Thangamma Nadachi, the grand mother of the Revision Petitioner herein for specific performance of the sale agreement dated 15.7.1999. It is stated that on the first date of hearing i.e. on 22.1.1999 one Selvamani, Advocate had entered appearance and filed a Written Statement conceding to pass a decree in favour of the 1st Respondent/ Plaintiff. Subsequently issues were framed and when the case was listed for trial, the Defendant remained absent and hence, an exparte decree was passed against the Defendant/Thangamma Nadachi.

3. An application to set aside the exparte decree was filed by Thangamma Nadachi in IA.No.376/2003 which was dismissed by the learned Principal District Munsif, Padmanabhapuram and the appeal preferred by her in CMA.No.13/2005 was also dismissed by the learned Subordinate Judge, Padmanabhapuram, as against which the present Civil Revision Petition is filed. Pending the appeal in CMA.No.13/2005, Thangamma Nadachi died and the present Revision Petitioner had been brought on record as legal representative of Thangamma Nadachi.

4. The grounds, on which the Defendant/Thangamma Nadachi sought to set aside the decree, are stated below:-

Thangamma Nadachi had filed a suit for partition against the 1st Respondent and others for partition of her 1/9th share in OS.No.703/1987 on the file of the learned Principal District Munsif, Padmanabhapuram and a preliminary decree was passed in favour of Thangamma Nadachi by Judgement and Decree dated 21.7.1996, negativing the contention of the other co-sharers including the 1st Defendant, who relied on a decree which according to Thangamma Nadachi is a collusive decree. As against the said Judgement and Decree, some of the co- sharers preferred appeal in AS.No.110/1997 on the file of the Sub Court, Padmanabhapuram. During the pendency of the said appeal, she had come to know of the exparte decree passed in the present suit in OS.No.235/1999 dated 21.1.2000. On further verification, she had come to know that one Advocate by name Selvamani had filed vakalath and even on the first date of hearing, that is, on 22.11.1999 had filed

the Written Statement submitting to the decree. The Presiding Officer, who entertained some doubt, posted the case on 23.11.1999 for identification of the parties and thereafter, the case was adjourned to 24.11.1999 and then to 26.11.1999. In the meanwhile, the Presiding Officer was transferred and the Judge, who succeeded him, framed issues on 6.1.2000 and posted the case for trial. Since the Defendant did not appear, she was set exparte.

5. It is the case of the Petitioner that she has not engaged the lawyer, by name, Mr.Selvamani and her advocate is only Mr.Madhavan Pillai who appeared for her in the earlier proceedings. She has categorically stated that she has not given any vakalath nama to any other Advocate and she does not know Mr.Selvamani who had entered appearance by filing vakalath in the suit.

6. It is her case that the sale agreement, based on which the present suit in OS.No.235/1999 is filed, is a forged one and fraud has been played on the court by the Plaintiff in the said suit in collusion with the Advocate who entered appearance on her behalf. It was urged by the Revision Petitioner both before the court below and in this Civil Revision Petition that the fact that the Presiding Officer posted the case for appearance of the Defendant namely Thangamma Nadachi entertaining doubt in the manner in which the Written Statement was filed would make it clear that a fraud has been played on the court.

7. The learned counsel for the Petitioner contended drawing my attention to the above said facts that the Thangamma Nadachi, the Defendant in the suit in OS.No.235/1999 had no knowledge of the decree and only when the same was filed in AS.No.110/1997 by one of the parties, immediately she had verified and had taken steps to set aside the exparte decree. On a perusal of diary extract of OS.NO.235/1999 filed by the Revision Petitioner, it reveals that on the first date of hearing, Advocate by name Mr.P.Selvamani had filed vakalath for the Defendant and a Written Statement has also been filed on the same day submitting to the decree. The then Presiding Officer has directed the Defendant to be present in person for the purpose of identification which would indicate that he entertained a doubt regarding the genuineness of the statement filed by the Defendant. Thereafter, the case has been adjourned to few hearings due to Advocates

boycott and in the meanwhile, it appears that the Presiding Officer was transferred and a new Officer had assumed charge.

8. From the diary extract, it is seen that the new Presiding Officer has failed to take note of the remarks made by his predecessor and had mechanically framed issues, in spite of the fact that the Defendant had submitted to the decree and the Written Statement was to the said effect. Thereafter, an exparte decree had been passed against the Defendant.

9. It is the consistent case of Thangamma Nadachi, the Defendant in the suit in OS.NO.235/1999 that she did not give any vakalath to Mr.Selvamni nor did she authorise any counsel to represent her. At this juncture, it may be pointed out that she had obtained a decree for partition against the 1st Defendant and other co-sharers and in such circumstances, whether she would submit to the decree is a question that remain unanswered. The affidavit sworn in by her in IA.No.376/2003 had narrated the entire facts and the same would clearly indicate that the Defendant in the said suit was not negligent, but was victim of circumstances. The Defendant Thangamma Nadachi had clearly pleaded that as soon as she learnt about the exparte decree in the appeal proceedings, she filed the application to set aside the exparte decree. There is absolutely no material to doubt her veracity.

10. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an exparte decree not only on the basis that the Defendant had been able to prove sufficient cause for his non appearance on the date when the decree was passed, but also must take into consideration the attending facts and circumstances. The bona fides have been spelt out in detail and in fact there is only general denial in the counter filed by the Respondent.

11. It has been held by a Division Bench of this court in 2009-3- CTC-342 (The Motor & General Finance Limited Vs. S.Durailingam and another) that mere knowledge of the suit is not enough to disentitle the Defendant from filing a petition to set aside exparte decree passed exparte beyond 30 days and the essential requirement is that the Defendant must be aware of the date of the decree if the summons were not duly served and the limitation starts running from the date of the knowledge of the decree.

12. The Honourable Supreme Court in Sushil Kumar Sabharwal Vs. Gurpreet Singh (AIR-2002-SC-2370) has held that it is the knowledge of 'pendency of suit' which is relevant for the purpose of construing the proviso of Rule 13 of Order 9 of CPC.

13. By applying the principles enumerated in the decisions referred to above, the facts and circumstances in the instant case sufficiently prove that she has filed the application immediately after she came to know of the passing of the exparte decree.

14. On going through the reasoning of the Trial Court, I am of the view that the learned Judge, in fact, has not considered the circumstances, which would go to show that there was sufficient cause for setting aside the exparte decree. Therefore, the impugned order of the Trial Court refusing to set aside the exparte decree was not justified and liable to be set aside.

15. In the result, this Civil Revision Petition is allowed and the impugned order is set aside. The application filed by the Petitioner in IA.No.376/2003 stands allowed. The learned trial Judge is directed to dispose of the suit, as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of this order. No costs. Consequently, the connected MP is closed.

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