

(2010) 03 MAD CK 0193

In the Madras High Court

Case No : C.R.P. (NPD) No. 4034 of 2009 and M.P. No. 1 of 2010

D. Siva Kumar

APPELLANT

Vs

Perilovanpatti Hindu Nadars (Madras) Uravinmurai

RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 7, 47

Citation : (2010) 03 MAD CK 0193

Hon'ble Judges : C.S. Karnan, J

Bench : Single Bench

Advocate : N.R. Anantha Ramakrishnan, for the Appellant; A.S. Kailasam, for the Respondent

Final Decision : Allowed

Judgement

C.S. Karnan, J.—The civil revision petitioner herein is the first defendant and the respondent herein is the plaintiff in the suit in O.S. No. 69 of 2002, on the file of the Sub-ordinate Court, Ponneri. The civil revision petitioner/first defendant filed an Interlocutory Application in I.A. No. 466 of 2008, before the Trial Court, praying to set aside the ex-parte order passed against him, on 04.09.2005, under Order 9, Rule 7 of Civil Procedure Code. On 13.04.2009, the Trial Court dismissed the set aside application. Hence, the civil revision petitioner/first defendant herein, filed the above revision petition praying to set aside the said order.

2. The short facts of the case are as follows:

The respondent/plaintiff has originally filed the civil suit in C.S. No. 1567 of 1994 against the revision petitioner/first defendant and three other defendants for declaration, that the plaintiff is the absolute owner of the schedule mentioned properties and consequently granting a decree for permanent injunction restraining the first defendant, his agents, representatives and assigns from, in any manner, interfering with the possession and enjoyment of the schedule

mentioned properties of the plaintiff. The suit was subsequently transferred to Sub-Court, Ponneri, on the basis of jurisdiction and the suit was re-numbered as O.S. No. 69 of 2002.

3. The plaintiff's society has stated that they have purchased the schedule mentioned property, measuring an extent of 2 Acres 4 Cents from the second defendant herein. The said Sale Deed has been registered on 19.03.1979. Subsequently, all documents were transferred in the name of the said plaintiff's Society, as such, the plaintiff has acquired the ownership of the property. The plaintiff further stated that the plaintiff seems to have given up his claims against the other contesting defendants in respect of the properties sold by his father to Chennaivazh Nadargal Sangam. The plaintiff in the suit had merely produced and marked a registered deed in the year 1963, which had admittedly nothing to do with the schedule mentioned properties.

4. Thereafter, the first defendant seems to have filed an application for passing a final decree and a Commissioner had been appointed and these plaintiffs understand that this Hon''ble Court was pleased to pass the final decree on 28.08.1998. Thereafter, the first defendant filed execution proceedings in Ponneri District Munsif Court for delivery of possession through Court. The said Execution Petition was objected by the Managing Committee, who filed an application u/s 47 of C.P.C. raising the question of jurisdiction of the District Munsif Court, Ponneri, in executing the decree. The said application was dismissed.

5. The revision petitioner/first defendant has filed Interlocutory Application No. 466 of 2008 against the respondent/plaintiff alone stating that the respondent/plaintiff has filed the suit for declaration that he is the absolute owner of the schedule mentioned properties and also for formal injunction, in O.S. No. 69 of 2002. In the said suit the revision petitioner submits that he has not received any summons in the above suit in O.S. No. 69 of 2002 filed by the respondents/plaintiffs herein. Further, the petitioner is not aware of the suit filed by the respondent herein, till he met the fifth defendant in this suit, who told the petitioner that a suit is pending against him before the Sub-Court, Ponneri. After knowing the fact that the suit is pending against him, he immediately, engaged the counsel for verification and the petitioner came to know that paper publication was ordered against him for the hearing on 15.07.2005. On effecting the paper publication, the petitioner was set ex-parte on 04.09.2005.

6. The revision petitioner would submit that he filed a suit for partition before this Court in C.S. No. 130 of 1979 and a preliminary decree was passed on 04.01.1984. Based on the said preliminary decree, the civil revision petitioner filed an application before this Court in M.P. No. 1892 of 1988 and a final decree was passed on 26.08.1988 by allotting the suit schedule mentioned properties in his favour. Based on that final decree, the revision petitioner had filed E.P. No. 2 of 1999 before the District Munsif Court, Ponneri and the possession was handed over to him through the E.P. proceedings. As such, the civil revision petitioner has become the absolute owner of the schedule mentioned properties.

7. The civil revision petitioner further submitted that the defendants 3 to 5 in the above suit, together with the other persons, filed a suit against him in O.S. No. 13 of 2003 before the District Munsif Court at Thiruvottiyur. In the said suit a compromise decree was entered and the compromise decree was passed on 30.06.2008. As such, the revision petitioner has become the absolute owner of the suit schedule property and as per the endorsement in the E.P. Proceedings, delivery of possession was also handed over to him, evidencing the possession in his favour. While so, the respondent/plaintiff herein has filed the above suit in O.S. No. 69 of 2002 claiming for declaration and injunction in respect of suit schedule properties.

8. Further the civil revision petitioner submitted that he is having a good defence in the above suit and unless the exparte order passed against him on 04.09.2005 is set aside, he will not be in a position to establish his case, in which case, he will be put into severe hardship and loss. Hence, the civil revision petitioner prays the Court to set aside the exparte order passed against him on 04.09.2005 in O.S. No. 69 of 2002 on the file of the Sub-Court, Ponneri.

9. The respondent/plaintiff has filed a counter statement and resisted the set aside application filed by the civil revision petitioner in I.A. No. 466 of 2008 stating that he denied the averments of the civil revision petition, wherein he had stated that only after meeting the fifth defendant, he had understood that a suit was pending against him. The revision petitioner wantedly and deliberately acted to avoid receiving the summons in the suit, hence paper publication was ordered against the revision petitioner. After publication was effected the ex-parte decree was passed, as such it is a valid decree. Further, the respondent submitted that this Court suit proceeding and the execution proceedings of the District Munsif Court are not connected with this case.

10. The civil revision petitioner is not the owner of the schedule mentioned property. Further, the respondent did not know the suit proceedings, which was decided by the District Munsif Court, Thiruvotriyur, on the basis of compromise memo of the parties concerned. Respondent's Society Ex-Secretary one Govindaswamy Nadar had expired. In his place a new secretary had been elected, who is also included and his name is being carried out in the suit proceedings. But, in the decree and decreetal order, the new secretary's name was wrongly mentioned. For which, an amendment petition has been filed, which is pending. Only after carrying out the name of the new secretary, the suit proceedings will proceed.

11. After considering the revision petitioner's contention made in his set aside application and the respondent's counter statement of the said application, the learned Sub-Judge, Ponneri has framed issues and decided the case. The learned Judge has pointed out that the suit in O.S. No. 69 of 2002 has been filed against the five defendants, out of which, the first defendant was served summon on 27.04.2005, on that day, the first defendant did not appear, hence, the first defendant/revision petitioner was set exparte. For second defendant paper

publication was ordered on 30.06.2005. the said publication was affected on 15.07.2005. As such, the second defendant was also set aside exparte. The plaintiff's society secretary A.R.Govinda Nadar had expired and in his place a new secretary as successor has filed the petition, which is pending on the file of the Sub-Court. At this stage the civil revision petitioner/first plaintiff filed a set aside application stating that he had come to understand through the fifth defendant that there is a case against him and he was set exparte on 15.05.2005 after paper publication. The revision petitioner has filed a set aside application against the respondents/plaintiffs alone and rest of the four defendants were omitted in the set aside application. Further, the revision petitioner stated that he was set exparte on 04.09.2005. Actually exparte decree was passed on 27.04.2005 against the revision petitioner as per Court records, stating that he was served summons through Court. On 15.07.2005, the second defendant was set exparte. As such, no order was passed on 04.09.2005, against the revision petitioner. The revision petitioner had not approached the Court with clear particulars. Hence, the set aside application was dismissed by the learned Sub-Judge, Ponneri.

12. Aggrieved by the said dismissal order passed by the learned Sub-Judge in I.A. No. 466 of 2008 in O.S. No. 69 of 2002, dated 13.04.2005, this Civil Revision Petition has been filed by the revision petitioner/first defendant.

13. The learned Counsel appearing for the revision petitioner argued that the said suit in O.S. No. 69 of 2002 is pending on the file of the Sub-ordinate Judge, Ponneri, against the other defendants. These defendants have filed written statement also. At this stage, the revision petitioner/first defendant should be given an opportunity to put forth his contention and establish his case. Further, the learned Sub-ordinate Judge failed to consider the Decree and Judgment for partition passed in C.S. No. 130 of 1979, dated 26.08.1988 for the said suit property. The learned Counsel further argued that as the set aside petition was dismissed on the basis of incorrect details given in the affidavit by the counsel and on the technicalities, it is not correct. If the affidavit is in correct, the petition should have been returned at the time of numbering. Hence, the learned Counsel prays for an opportunity to proceed with the case along with co-defendants.

14. The learned Counsel appearing for the respondents/plaintiffs argued that the revision petitioner was duly served summons through Court and after that he was called ex-parte on 27.04.2005. But, the revision petitioner has stated in his affidavit that he was set exparte on 04.09.2005. On the side of the revision petitioner, a difference of opinion arises on his version. The first defendant's intention is to prolong the case. Further, the learned Counsel argued that the other defendants were not added in the set aside application in I.A. No. 466 of 2008. As such, the learned Sub-Judge Order dated 13.04.2009 is fair and there is no error in this order passed in I.A. No. 466 of 2008 in O.S. No. 69 of 2002, on the file of the Sub-Court, Ponneri.

15. Considering the facts and circumstances of the case, scrutiny of findings of the learned Sub-Judge, Ponneri and arguments advanced by the learned respective counsels for their parties concerned, this Court is of the view that

1. The suit in O.S. No. 69 of 2002 has been filed by the plaintiff against the five defendants. But, set-aside application has been filed by the first defendant as against the plaintiff alone and the other four defendants were omitted in the said application,

2. In the cause title, five defendants names have been mentioned, but in the body of the plaint only two defendants names and addresses have been mentioned.

3. The ex-parte decree was passed against the revision petitioner/first defendant on 27.04.2005, but the revision petitioner stated in his affidavit that he was set exparte on 04.09.2005,

4. The set aside application in I.A. No. 466 of 2008 has been filed in the month of November, 2008,

5. The Civil Revision Petition has been filed against the respondent/plaintiff. The other four defendants were not added as parties in this revision petition also,

6. The respondent/plaintiff has stated in the plaint that C.S. No. 130 of 1979 has been filed before this Court for partition,

7. O.S. No. 13 of 2003 has been filed before the District Munsif Court at Thiruvotriur.

The above mentioned issues are arising from the same property, now subject matter of O.S. No. 69 of 2002, on the file of Sub-Court, Ponneri. In the suit, the revision petitioner/first defendant is the contesting party. The respondent/plaintiff sought a permanent injunction restraining the revision petitioner herein.

16. As per plaint averments of the respondent/plaintiff and affidavit of revision petitioner/first defendant made in I.A. No. 1466 of 2008 in O.S. No. 69 of 2002, on the file of the Sub-Court, Ponneri, there are two Decrees and Judgments binding over the suit property. There is an allegation among the parties that judicial power has been misused by one against another. In the circumstances, this Court finds some error on the side of the revision petitioner for filing the set aside application, as the set aside petition had not been filed within a period of 30 days. But, it was filed about three years later, for which a condone delay petition has to be filed along with set aside petition. Further all the defendants were not included in the set aside application and even in this revision petition also, and as such the revision petitioner has not followed the legal formalities. However, in the interest of justice, this Court pardons the error committed by the revision petitioner.

17. In the said Suit O.S. No. 69 of 2002, several legal issues arise, and these issues have to be decided after recording the evidence of all parties concerned in

this suit and the perusal of the connected documents of the parties, before the Trial Court can come to a correct conclusion by way of rendering justice to the parties concerned. As such, the revision petitioner/first defendant has a vital role in the said suit, as a necessary party. Now, this suit is pending for trial on the file of Sub-Court, Ponneri, between the first respondent/plaintiff and four defendants. Without recording the evidence of the revision petitioner/first defendant and his documentary evidence, if the Trial Court ie. Sub-Court, Ponneri, takes any decision in O.S. No. 69 of 2002, lacunae will arise.

18. Hence, this Court allows the Civil Revision Petition and sets aside the fair and decreetal order dated 13.04.2009 in I.A. No. 466 of 2008 in O.S. No. 69 of 2002, on the file of the Sub-ordinate Judge's Court, Ponneri and allows the I.A. No. 466 of 2008 in O.S. No. 69 of 2004 and sets aside the exparte order passed against the revision petitioner on 27.04.2005.

19. This Court hereby directs the Sub-Court, Ponneri to dispose the case on merits after hearing the revision petitioner/first defendant's side after allowing sufficient time. This Court further directs that originally the cause of action arose on 09.10.1994, hence this Court hereby directs the Sub-Court, Ponneri to dispose the case within a period of six months from the date of receipt of a copy of this Order. Accordingly, the above Civil Revision Petition is allowed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.