
(2000) 03 MAD CK 0034

In the Madras High Court

Case No : C.R.P.No.2377 of 1999 and C.M.P.No.13363 of 1999

Seethai Ammal and 5 others

APPELLANT

Vs

V.C. Vikundam and 5 others

RESPONDENT

Date of Decision : 28-03-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 148

Citation : (2000) 3 CTC 461 : (2000) 2 LW 506 : (2000) 4 RCR(Civil) 668

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : Mr. Y.K. Rajagopal, for the Appellant; Mr. V. Swaminathan, for the Respondent

Judgement

1. Legal heirs of defendant in Q.S.No.22 of 1997 on the file of District Munsif Court, Vilathikulam are the revision petitioners herein.

2. Suit filed by plaintiffs was one for recovery of possession with arrears of rent. In the plaint it is alleged that originally defendant was tenant who

agreed to pay Rs.625 per month as rent and defendant defaulted in paying the same and he is liable to be evicted. Notice was issued terminating

tenancy.

3. In the written statement filed by deceased defendant he admitted that he has taken only vacant site and put up construction 35 years prior to the

institution of the suit, but he agreed that he is liable to pay Rs.625 as monthly rent. He also questioned the validity of the notice. He prayed for

dismissal of the suit.

4. Case was posted in the list and since defendant did not appear, ex parte decree was passed.

5. Defendant himself filed an application to set aside the ex parte decree and

pending application he died. Petitioners are impleaded as additional petitioners. An order was passed allowing the application on condition that petitioners should pay Rs.150 towards cost on or before 7.6.1999, failing which it was directed that the application shall stand dismissed. Petitioners could not pay the amount and they moved another application I. A. No.126 of 1999 to extend the time by one month for paying the amount. That application was filed on 20.6.1999. By the impugned order accepting the objection of plaintiffs, the same was dismissed. The said order is under challenge in this revision petition.

6. Notice of motion was ordered and respondents also entered appearance and I heard the learned counsel on both sides.

7. One of the main contentions raised by learned counsel for petitioners is that the application is filed for extension of time and the question whether petitioners are entitled to have the time extended or not is not properly considered by court below. According to learned counsel for petitioners, lower court only held that since cost is not paid in time application was dismissed. Said approach of lower court is criticised by learned counsel for petitioners.

8. As against this contention, learned counsel for respondents submitted that it is only on the basis of consent given by both parties ex parte decree was sought to be set aside. Being an order by consent, there is no scope for extension of time unless both parties agree for extension of time. At any rate, court also become functus officio in extending time. Finally it is argued that no sufficient cause is made out for extension of time. Counsel submitted that regarding this argument there is finding of fact entered by lower court and the same is not liable to be interfered in revision.

9. Regarding power for extension of time, I do not think that the submission of learned counsel for respondents could be accepted. From the copy of progress diary, the correctness of which is not disputed by respondents and who relied on the same it could be seen that on 16.4.1999 court passed the following order.

In view of the endorsement made by the counsel for both parties the petition will be allowed on payment of cost of Rs.150 to be paid by the petitioner/plaintiff to the respondents on or before 7.6.99, failing which this petition shall stand dismissed: Call on 8.6.99.

On. 8.6.1999 Court was not sitting and the matter was adjourned by notification to 23.6.1999. On 23.6.1999 also case was adjourned to

28.6.1999 since the Judge was not sitting. On 28.6.1999 an application u/s 148 of CPC was filed for extension of time and the matter was taken

up on 30.6.1999. From 30.6.1999, the matter was adjourned to 2.7.1999 and on 2.7.1999 trial court held that I.A No.126 of 1999 was

dismissed and hence the application under Order 9, Rule 13 is also dismissed as cost was not paid.

10. It is true that it is on the basis of endorsement made by learned counsel on both sides petition was allowed on payment of costs. But the

consent is also made as order of the Court. In such a case Court has got power for extension of time as was held in Smt. Periyakkal and Others

Vs. Smt. Dakshyani, . After considering earlier decisions of the Honourable Supreme Court, in para. 4 of the Judgment their Lordships held thus.

In the case before us, the situation is totally different. Unlike the case of Hukamchand Vs. Bansilal and Others, where there was a statutory

compulsion to confirm the sale on the dismissal of the application under O.21, Rule 90 and, therefore, postponement and further postponement of

the confirmation of the sale could only be by the consent of the parties, in the case before us, there was no statutory compulsion to dismiss the

application under O.21, Rule 90 in the absence of an agreement between the parties. The Court would have then decided the appeal arising out of

the application on the merits.

The parties, however, entered into a compromise and invited the Court to make an order in terms of the compromise, which the court did. The

time for deposit stipulated by the parties became the time allowed by the Court and this gave the Court the jurisdiction to extend time in

appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest

injustice. True, the Court would not rewrite a contract between the parties but the Court would relieve against a forfeiture clause; And, where the

contract of the parties has merged in the order of the Court, the Court's freedom to act to further the ends of justice would surely not stand

curtailed Nothing said in Hukumchand's case militates against this view. We are, therefore, of the view that the High Court was in error in thinking

that they had no power to extend time. ..."" (Italics supplied)

11. In view of the above decision it is clear that Court has jurisdiction to extend the time u/s 148 of Code of Civil Procedure.

12. The only other question requires consideration is whether the words ""failing which this petition stands dismissed"" in the order dated 16.4.1999

prohibits the Court from extending time or Court got jurisdiction or Court become functus officio in extending time.

13. In Muniammal Vs. Sakkubai and Another, this question was elaborately considered and finally in para 13 of the Judgment the learned Judge

summarised the law thus,

The authorities thus indicate that the question as to whether the exercise of jurisdiction under S. 148 C.P.C. is proper or not will depend on

whether at the time when the application was made, the Court was or was not functus officio and whether it had seisin of the case."" (Italics

supplied)

14. While passing order on 16.4.1999 Court only said ""failing which this petition will stands dismissed. Call on 8.6.1999."" It means that further

order has to be passed on the application. On 8.6.1999, no order could be passed since Judge was on leave. The matter was adjourned to

23.6.1999 on which date also matter could not be taken up for the same reason. On 28.6.1999 application u/s 148 was filed and even on that

date Court did not pass any order and the matter was adjourned to 30.6.1999 and on that date also matter was only adjourned to 2.7.1999. On

2.7.1999 since extension of time was not granted. Order 9, Rule 13 petition was also dismissed. Court itself understood that it has got power to

extend time and that is why consequent to the dismissal of extension petition it dismissed Or. 9, R. 13 petition also. When I. A. No.126 of 1996

was filed Court ceased of the matter since no order was passed on Order 9, Rule 13 petition. Following the decisions cited above, Court has

jurisdiction arid has not become functus officio in passing an order u/s 148 of Code of Civil Procedure.

15. Now the question to be considered is whether the discretion exercised by Court is liable to be disturbed.

16. Lower Court dismissed the application on the ground that if first petitioner is not available, other petitioners would have paid the amount. When

first petitioner has stated that it is she who is looking after the entire affairs and all of them are her children, non-payment of amount should not have

been made as ground for dismissal of the application. First petitioner has stated, that she was not well and she was suffering from jaundice and

could not contact the counsel. Application was also filed within reasonable time and that too without any delay. Under these circumstances, I feel

that one more opportunity should have been given to petitioners to contest the suit by extending time for payment of cost.

17. At this juncture, teamed counsel for respondent submitted that in this case tenancy is admitted and huge amount is due towards rent arrears.

Even in 1997, huge amount is due towards rent arrears. At least, petitioner must be directed to pay portion of the amount as condition for allowing

the extension of time. I feel that the said submission of learned counsel is reasonable and to be accepted. Rate of rent is Rs. 625 is admitted by

deceased descendent. Whether it is vacant site or building are all to be decided in the suit. Under these circumstances I feel that petitioner must be

directed to pay to respondent a sum of Rs.15,000 being two years rent as condition precedent for permitting them to contest the suit or for having

the Order 9, Rule 13 petition set aside. I direct them to pay the amount on or before 30.6.2000. If the said amount is paid, application, under

Order 9, Rule 13 will stand allowed and reasonable opportunity will be given to petitioners to adduce evidence. If the amount is not paid the

revision petition will stand dismissed with costs.

18. In the result, the revision petition is disposed of as above. Consequently, C.M.P.No.13363 of 1999 is also closed.