

(2009) 08 MAD CK 0371

In the Madras High Court

Case No : M.P. No. 1 of 2009 in C.R.P. (P.D.) No. 3531 of 2008

V. Palanisamy

APPELLANT

Vs

Shanmugha Grounder, D. Bharathi, D. Ayyappa Sankunni and
D. Manjula

RESPONDENT

Date of Decision : 05-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 5, Order 3 Rule 6,
Order 41 Rule 11, Order 41 Rule 5
Constitution of India, 1950 — Article 226, 32

Citation : (2009) 6 CTC 774

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : A. Kuppuswamy, for the Appellant; Mukunthan, Advocate for
Respondent No. 1; No Appearance for Respondent Nos. 2 to 4., for the
Respondent

Judgement

M. Venugopal, J.—The Petitioner/First Respondent has filed this Miscellaneous Petition praying this Court to set aside the order dated 29.10.2008 passed in C.R.P. (P.D) No. 3531 of 2008 in allowing the Civil Revision Petition. According to the learned Counsel for the Petitioner, the Petitioner has figured as First Respondent in C.R.P. (P.D.) No. 3531 of 2008 and has filed a Suit as Plaintiff seeking the relief of Specific Performance pertaining to the property covered in the purported agreement entered into by him with the Respondents No. 3 and 4 before the learned Additional and Sessions Judge (Fast Track Court No. 1, Coimbatore) and that the Petitioner herein has taken a specific plea that the property mentioned in the alleged agreement is not in existence on ground and that in I.A. No. 198 of 2008 in O.S. No. 840 of 2004 filed by him praying for appointment of an Advocate Commissioner to inspect the property and to identify the property with a help of a surveyor has been allowed by the Trial Court and further that he filed a Caveat Petition No. 3761 on the file of this Court on 10.09.2008 and a copy of the acknowledgment for receipt of the Caveat Petition

on 15.09.2008 by the First Respondent has been submitted for perusal and the First Respondent ought to have asked his Counsel at Chennai to furnish a copy of the type set of papers to his Advocate for the purpose of filing necessary Counter to substantiate his case and moreover this Court has passed final order in the Civil Revision Petition on 29.10.2008 without proper notice being served either to the Petitioner-Counsel at Chennai or to the Petitioner or to the Counsel on record of the Trial Court at Coimbatore, and inasmuch as the First Respondent has obtained the final order in the Civil Revision Petition behind his back has committed and played a fraud on the Court and also on the opposite party and therefore, the order passed by this Court in the Civil Revision Petition needs to be set aside in the interest of justice.

2. In support of the contention that the Respondent/Revision Petitioner has not submitted any sketch or revenue map together with the Plaint to identify the suit property with four boundaries in conformity with Order 7, Rule 3 of CPC and Rule 11 of Civil Rules to Practice, the learned Counsel for the Petitioner cites the decision of Hon"ble Supreme Court in *Vimlesh Kumari Kulshrestha Vs. Sambhajirao and Another*, wherein it is held that:

in an agreement to sell immovable property failure to annex map giving full description of property rendered the agreement unenforceable.

3. He also places reliance on the decision of Hon"ble Supreme Court in *Venkatesh Vs. State of Karnataka and Others*, wherein it is laid out that:

notice must be served on the concerned Respondent even though he might have appeared on Caveat unless Counsel on his behalf has waived service and there is no acknowledgment to show that notice of Writ Petition has been served on the Respondent and the Cause List showing name of an Advocate for Respondent in Caveator is not a sufficient notice.

4. The learned Counsel for the First Respondent (Civil Revision Petition) submits that this Court has allowed the main C.R.P. (P.D.) No. 3531 of 2008 without costs on 29.10.2008 holding that "the order passed by the Trial Court in allowing I.A. No. 198 of 2008 for appointment of Advocate Commissioner is not sustainable in the eye of law and that certainly the I.A. No. 198 of 2008 for appointment of an Advocate Commissioner is a luxurious one and accordingly set aside the order of Trial Court passed in I.A. No. 198 of 2008 in O.S. No. 840 of 2004 dated 01.08.2008 and therefore, this Court need not set aside the order passed in the Civil Revision Petition in the interest of justice.

5. According to the learned Counsel for the First Respondent/Revision Petitioner the filing of the Caveat by the Petitioner/Respondent has not been brought to the notice of this Court when orders have been passed in the main C.R.P.(P.D.) No. 3531 of 2008 on 29.10.2008 and that the Petitioner/First Respondent (in M.P. No. 1 of 2009) has no locus standi in the case and if the Plaintiff establishes his case that the Defendant has no right then he succeeds and that the First Respondent/Petitioner need not fight with the Petitioner/First Respondent when

he is not bound to, and that when there is a Caveat the Civil Revision Petition has been filed unknowingly and therefore, the Miscellaneous Petition may be dismissed.

6. The learned Counsel for the First Respondent/Petitioner cites the decision of Hon"ble Supreme Court in M.C. Mehta Vs. Union of India (UOI) and Others, , wherein it is held that:

It is not always necessary for the Court to strike down an order merely because the order has been passed against the Petitioner in breach of Natural Justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the Petitioner and against the opposite party, in violation of Principles of Natural Justice or is otherwise not in accordance with law. It is therefore, clear that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a Writ merely because there is violation of Principles of Natural Justice.

7. He also relies on the decision of Hon"ble Supreme Court in Ramesh Chandra Pattnaik Vs. Pushpendra Kumari and Others, , wherein it is held that:

subsequent purchaser was not at all a necessary party for determination of genuineness or otherwise of the agreement of sale, etc.

8. Added further, the learned Counsel for the First Respondent/Petitioner brings it to the notice of this Court to the decision Venkatapathyd Krishna Murti v. V. Srinivasan, 2004 (2) MLJ 507, wherein it is held that:

if the Plaintiff establishes that the Defendant has no interest in the estate of the deceased and would have no interest therein even if he were to succeed in establishing the facts pleaded, it would follow that the Defendant has no locus standi to file a Caveat.

9. He also places reliance to the decision of this Court in Murugesan v. Jamuna Rani, 2008 (4) TLNJ 33 (Civil) wherein it is held that:

in Specific Performance Suits what is to be decided is about a valid agreement, ready and willingness of the parties and there is no necessity to appoint a Commissioner to determine the value of the property.

10. It is represented on behalf of First Respondent/Petitioner that the Second Respondent is the mother and all others are sons and daughters and they are the owners of the property and that the suit sale agreement is dated 16.07.2003 and the fourth Defendant/Petitioner in M.P. No. 1 of 2009 has been added as a party to the Suit as per order made in I.A No. 663 of 2007 dated 16.11.2007 and the total sale consideration is Rs. 11 lakhs and an amount of Rs. 4 lakhs and a further sum of Rs. 6 lakhs have been paid towards advance and later another sum of Rs. 1 lakh has been paid on 14.08.2007 and as such the entire sum of Rs. 11 lakhs has been paid and moreover the Petitioner/Fourth Defendant has no

absolute right or claim over the suit property and any decree passed against the Defendant 1 to 3 will bind on the successors, agents and subsequent claim holders and the Petitioner/Fourth Defendant cannot have any separate defense for himself and also that the Sale Agreement dated 20.08.2007 between Defendant 1 to 3 and 4 is not binding on the First Respondent/Revision Petitioner.

11. In G.C. Siddalingappa Vs. G.C. Veeranna, , wherein it is among other things held that:

Section 148-A(3) of CPC is a condition precedent for serving an Application on Caveator before passing interim order, etc.

In C. Seethaiah Vs. Government of Andhra Pradesh and Others, wherein it is held that:

also, when a Caveat is lodged it becomes not only the duty of the Court but also of the Petitioner and his Counsel to bring to the notice of the Court that Caveat has been lodged and the matter may not be heard ex parte, etc.

12. In M. Krishnappa Chetty and Another Vs. P.E. Chandrasekaran @ Chandran, wherein it is observed as follows:

The proper procedure to be adopted in all cases where Caveat has been filed is for the Plaintiff/Petitioner to serve copies of the Complaint and Application on the Caveator's Counsel or the Caveator before filing them in Court. He must inform the Caveator or his Counsel as the case may be, the date on which he will move the Application before Court. He must also file acknowledgments of the receipt of copies obtained from the Caveator's Counsel or the Caveator as the case may be, in Court along with the Application. On receiving such papers the office of the Court shall, while fixing the date for the first hearing of the Application prepare a note and bring it to the notice of the presiding officer concerned that Caveat has been entered and the Caveator's Counsel or the Caveator has been served with copies of Complaint and the Application. The Presiding Officer shall direct the office of the Court to issue notice to the Caveator's Counsel or the Caveator, as the case may be, specifying the date on which the matter will be heard in the first instance. The Court shall inform the Petitioner's Counsel also of the said date and on that date both sides shall be heard before any interim order is passed. This procedure shall strictly be followed by all the Subordinate Courts. There shall be no lapse in following this procedure.

13. In K. Rajasekaran Vs. K. Sakunthala and Others where in it is observed that:

the order of interim relief is not void. But when the fact situation which culminates in non-issuance of any notice as contemplated u/s 148-A of the CPC is brought to the notice of the Court, the Court has to necessarily vacate the order and hear the Application on merit and pass necessary orders.

14. It is not out of place to point out that a Caveat is an intimation to a judge or officer notifying that the opposite party be given an opportunity to be heard

before any action is taken on the application or proceeding initiated by the other side. In this connection in *Chandrajit and Another Vs. Smt. Ganeshiya and Others*, wherein it is held as follows:

Order 41, Rule 11 of the C.P.C. does not in terms grant a right of hearing at the admission stage to a party as against whom an Appeal has been filed. But, the powers of the Court to hear the opposite party or Respondent, where ends of justice require, are unlimited. Normally, better justice is likely to be done if the two sides are heard. At the stage where the Caveat is filed before admission, the Court does not issue any notice. It only hears both the sides and passes appropriate orders. Something is done by the Court before granting a stay order under Order 41, Rule 5 of the C.P.C. At that stage, the Court has the discretion to give such opportunity to the Respondent as ends of justice may require before granting or giving stay orders. Judiciary has a description in these matters, sometime large and sometime limited, and restricted, but it is never without it. The judicial discretion is neither caprice, nor whim, nor extrinsic but a complex and inherent process where the reasons combine with experience, law and justice.

15. This Court worth recalls the observation made in the decision in *M. Ranka v. Hon"ble the Chief Justice of Tamil Nadu, High Court, Madras and 3 others*, 1991 (2) LW 225 at page 231, wherein it is inter alia held that

... All that Court is expected to do on the face of Caveat is to beware and to hear the Caveat or before a decision is taken. A Caveator does not get a right to defeat the proceedings at the threshold or to insist that he must be heard on merits of the case before any interim order is passed. The hearing at the stage of the admission of an appeal to the Caveator will not take the place of a final hearing of the appeal at the end of the proceeding.

Moreover, it is also held that "a Caveat is nothing but a formal notice, which literally is not different from a caution. Its origin as a petition to Court is generally traced to the proceedings in the Courts of probate. It is just an intimation given to the Court notifying it that it ought to beware or suspend proceedings before it until the merits of the Caveat are determined. It does not create any obligation upon the Court to desist from making any order in the proceeding before it unless the Caveat is decided."

16. In *Akbar Ali and 2 others Vs. Alla Pitchai*, wherein it is inter alia observed that:

it is true that in certain provisions of CPC a reference is made to the agent of the part. However, that does not mean that whatever and wherever a reference is not made to a Counsel or an agent a notice to an agent or a Counsel is bad in law. It is necessary to remember that Section 148-A of C.P.C. cannot be read in a closed jacket or in isolation; the same will have to be read in conjunction with the provisions reflected in Order 3, Rules 1, 5 and 6 of C.P.C. as also Rule 19 of Civil Rules of Practice.

In the aforesaid decision at page 845 it is also observed that:

... looked at from any point of view we are of the view that notice to the lawyer of the Caveator should be given. Further, it is also necessary to remember that if that course of action is not followed status of a lawyer who is an officer of the Court is likely to be diluted. However, we hasten to add here that in a given case instead of issuing a notice to the Advocate, a notice is given, in fact, to the party, the same cannot be considered as bad in law if it has not otherwise prejudiced him in the context of the circumstances referred to by us earlier. At the same time, we make it clear that it should be the duty of the Court to cause the notice of the Application on the lawyer.

17. At this stage it is significant to point out that Section 148-A of the CPC has to be construed as a right given to an individual to lodge a Caveat, where an Application is expected to be made or has been made in a Suit or a proceedings instituted or a proceedings instituted or about to be instituted in a Suit. Therefore, even in cases, where it is not possible to identify or locate a person or persons who are likely to institute a Suit or a proceedings, and make an Application in such a proceeding, still a Caveat Petition can be lodged and if such Caveat Petition is lodged, such a Petition is required to be registered by the Court. As a matter of fact, just because sub-section (2) of Section 148-A provides for service of notice of such a Caveat Petition on an individual, who is expected to file a Suit or a proceedings and the requirement of the said sub-section cannot be complied with, cannot be a ground to refuse or to reject the Caveat Petition. Indeed, the ingredient of sub-section (2) of Section 148-A of CPC is required to be complied with when it is capable of doing so. That apart, the substantive right to lodge a Caveat cannot be taken away on the basis that provisions of sub-section (2) of Section 148-A of CPC cannot be complied with. Whenever the ingredient of the said provision is incapable of compliance, it will be within the discretion of the Court, if valid grounds are shown for non-compliance of the said provision, to dispense with the compliance of sub-section (2) of 148-A of CPC and direct the office to register the Caveat in the considered opinion of this Court. However, when a Caveat Petition is lodged, the Caveator should specify, with certainty, the subject matter of the dispute, in a Suit or proceedings likely to be instituted, if that is specified, it is open to the Court before which the Caveat is lodged in its discretion, to dispense with the requirement of sub-section (2) of Section 148-A of Civil Procedure Code, if an Application u/s 151 of CPC is filed praying for dispensation of such requirements.

18. It is relevant to point out that in the decision in *Kendriya Vidyalaya Sangathan Vs. M.L. Mudgal*, it is observed that:

the provision u/s 148-A and the object of its inclusion in Civil P.C. By 1976 amendment does not require that the Caveator should be heard before the Court admits a proceeding. It is only a matter of procedure between the party seeking admission and the Court. Want of notice at stage of admission to Caveator does not invalidate the admission. No prejudice is caused to the Caveator and

admission can be challenged at the time of final hearing.

Moreover, in State of Karnataka and Another, it is inter alia observed that:

the provisions of sub-Section (2) of Section 148 ought to be construed as directory in nature, in the considered opinion of this Court.

19. It is to be borne in mind that the concept of "Natural Justice" is not a static one. Rules of Natural Justice are not embodied rules and they cannot be imprisoned within the strait-jacket of a rigid formula. Violation of Principles of Natural Justice does not by itself make the order a non-est. The affected has to establish the prejudice caused thereby.

20. In R.S. Dass Ors. Vs. Union of India (UOI) and Others, , it is held as follows:

it is well established that Rule of Natural Justice are not rigid rules; they are flexible and their Application depends upon the setting and the background of statutory provision, nature of the right which may be affected and the consequences which may entail, its Application depends upon the facts and circumstances of each case.

21. Accordingly, the effect of violation of Rules of audi alteram partem has to be considered even if hearing is not afforded to the person who is sought to be affected or penalized, can it not be argued that "notice would have served no purpose" or "hearing could not have made difference" or "the person could not have offered any defense whatsoever".

22. In Smt. Badani Kumari Patra and another v. Purna Chandra Jena and others, it is held as follows:

The provisions contained in Section 148-A, C.P.C. envisage that where a Caveat has been lodged, the Court shall serve notice of the Application filed in such Suit or proceeding, on the Caveator as contemplated in Section 148-A(3). Similarly, Section 148-A(4) contemplates that where a notice of a Caveat has been served on the Applicant, such Applicant shall serve a copy of the document, which has been filed in support of such Application. It is thus apparent that u/s 148-A the Caveator has a right to be heard, if any Application is filed. In the present case, the Appellants had filed an Appeal u/s 100, C.P.C. By no stretch of imagination, it can be held that a Memorandum of Appeal u/s 100, C.P.C. is an Application coming within the purview of Section 148-A. As a matter of fact, Order 41, Rule 11, C.P.C. envisage that if an Appeal is taken up for admission, notice need not be issued to the Respondents at that stage. Since the Memorandum of Appeal is not an Application and Respondents did not have any right to object to the admission of Appeal at the stage of admission the Application filed for recalling the order of admission is misconceived and accordingly rejected.

23. It is needless to state that the requirement of specifying name of party likely to initiate proceedings u/s 148-A(2) of CPC is the only directory in nature in the considered opinion of this Court.

24. Just because sub-section (2) of Section 148-A provides for service for notice of such a Caveat Petition on a person who is expected to file a Suit or proceeding and the requirement of such sub-section cannot be complied with, cannot be a basis to refuse to reject the Caveat Petition.

25. Furthermore, sub-section (2) of Section 148-A of the CPC is required to be complied with when it is capable of being complied with.

26. As far as the present case is concerned it is not in dispute that the Petitioner/ First Respondent has lodged a Caveat Petition No. 3761 on 10.09.2008 and further the said Caveat Petition is said to have been received by the Respondent/ Revision Petitioner on 15.09.2008. When the Respondent/Revision Petitioner has filed the CRP(PD) No. 3531 of 2008 there is no endorsement on the side of Respondent/Revision Petitioner that "Caveat Register has been perused/verified" and also whether a Caveat has been entered/served or otherwise. The office of the Registry is also to verify the concerned category Caveat Register and to make appropriate endorsement in the papers so filed. As a matter of fact, the Registry ought not to have numbered the Civil Revision Petition (PD) 3531 of 2008 when admittedly the Caveator (Petitioner in M.P. No. 1 of 2009) has not been served. However, it is a different matter if the Respondent/Revision Petitioner has filed an Affidavit explaining the reasons as to the noncompliance of sub-section (2) of Section 148-A of CPC in the office of the Registry. Then, it is open to the Court before which the Caveat is lodged in its discretion to dispense that the requirement of sub-section (2) of Section 148-A of Civil Procedure Code, if an Application u/s 151 of CPC is filed. But, in the present case the Respondent/ Revision Petitioner has not followed such a procedure. The main aim of the Section 148-A of CPC is that to give an opportunity to the opposite party to be heard before an ex parte order is made and to show cause as to why it should not be passed, and also to avoid plurality of proceedings for, that such a provision, an individual or a party to the Application will have to file a proceeding to get rid of an order on the Application if it affects him prejudicially. In the present case on hand as enjoined u/s 148-A(3) of CPC the Court has not given a specified date for hearing of the Civil Revision Petition. Generally a reasonable and definite time to a Caveator to appear and also oppose the matter intended to be moved by a party ought to be given in usual course in the considered opinion of this Court. It is the primordial duty of the First Respondent/Revision Petitioner to serve the copies of grounds, etc., to the Caveator or his Counsel and failure to do so is indeed not a palatable one in the Justice Delivery System.

27. On a conspectus of the facts and circumstances of the case in an objective fashion and also on a careful consideration and respective contentions and because of the fact that the Section 148-A of CPC is a matter of procedure between the party seeking admission and the Court, this Court is of the considered view that a Caveator at the threshold is not entitled to insist that he should be heard pertaining to the case before any order is passed and as a matter of fact this Court has ample powers to pass the orders dated 29.10.2008

in the main Revision Petition (PD) No. 3531 of 2008 and such passing of the final orders without giving notice to the Petitioner/First Respondent or the Respondent No. 2 to 4 is not without jurisdiction and the same is perfectly valid in the eye of law and moreover, on the facts and circumstances of the case, while allowing the main Civil Revision Petition this Court has "among other things opined" an Advocate Commissioner should not be appointed to gather or collect evidence and therefore the order passed by the Trial Court in I.A. No. 198 of 2008 for appointment of an Advocate Commissioner is a luxurious one, etc., and that these observations cannot prejudice the Petitioner herein either substantially or materially and accordingly the M.P. No. 1 of 2009 is disposed of without costs. While parting, this Court is earnestly of the view that in cases where the Caveat has been filed it is for the concerned to serve copies of the grounds, affidavit Petition, typed set and the copies of the Complaint or the necessary papers, etc., and Application on the Caveator's Counsel or the Caveator before filing them in the office of the Registry. In all fairness the Revision Petitioner/Applicant must inform the Caveator or his Counsel as the case may be, the date on which he will move the Application before the Court. As a matter of fact, he should also file acknowledgment of the receipt of copies obtained from the Caveator's Counsel or the Caveator as the case may be, in the office of the Registry along with Application. On receipt of such papers the office of the Registry, while fixing date for first hearing of the Application, consider the desirability of preparing a note and bring it to the notice of the concerned Court that the Caveator has been entered and the Caveator's Counsel or the Caveator has been served with copies of Complaint and Application. There upon on the order of the Court, the office of the Registry may issue a. notice to the Caveator's Counsel or the Caveator as the case may be indicating the date on which the matter will be heard in the first instance and before any interim order is passed. Since, an Advocate is an officer of a Court of Law he is bound to serve the copies of the grounds, affidavit Petition, typed set, etc., on the Caveator's Counsel or the Caveator. When a Caveat has been lodged as per Section 148-A of the CPC it is incumbent on the part of the Registry to print the name of the Caveator or his Counsel in the Cause List without fail. By adopting this procedure this Court sincerely opines that it will avoid lapses/complications.