

(2006) 07 MAD CK 0193

Madras High Court

Case No: C.R.P. PD No. 348 of 2004

M. Ramakrishnan

APPELLANT

Vs

Vinod Kumar Goyal

RESPONDENT

Date of Decision: July 10, 2006

Acts Referred:

- Limitation Act, 1963 - Section 5

Citation: (2006) 4 LW 650

Hon'ble Judges: S. Rajeswaran, J

Bench: Single Bench

Advocate: G. Kathirvelu, for the Appellant; P. Vasudevan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Rajeswaran, J.

This revision petition has been filed against the order dated 8.1.20 04 passed by the I Asst. City Civil Court, Chennai in I.A. No. 19988/20 03 in O.S. No. 8361/1995.

2. The plaintiff is the revision petitioner.

3. The plaintiff has filed O.S. No. 8361/95 on the file of the 1st Asst. City Civil Court, for a judgment and decree for the relief of recovery of possession of the suit schedule property which is a vacant land in premises bearing No. 593, Tiruvottiyur High Road, Old Washermanpet, Chennai.21 and also for other reliefs.

4. The suit was decreed exparte on 29.7.2002 and an Application in I.A. No. 19988/2003 was filed on 9.9.2003 by the respondent herein to set aside the said exparte decree. This petition was seriously contested by the revision petitioner/plaintiff on the ground that already a petition in I.A. No. 13041/2002 was filed by one Thennarasu, who was the Power of Attorney of respondent/defendant and who had purchased the alleged superstructure put up by the

respondent/defendant and the same was dismissed on 12.3.2003 itself and therefore the present Application to set aside the exparte decree at the instance of the principal, the respondent herein is not at all maintainable. The trial court by order dated 8.1.2004 allowed the Application on condition that the respondent herein should pay a cost of Rs.2,500/- to the revision petitioner herein. Aggrieved against the order dated 8.1.2004, the above Civil Revision Petition has been filed by the petitioner/ plaintiff.

5. Heard the learned Counsel for the revision petitioner and the learned Counsel for the respondent.

6. The learned Counsel for the revision petitioner strenuously contended that I.A. No. 19988/2003 to set aside the exparte decree passed on 29.7.2002 is hit by res judicata as already an Application in I.A. No.13041/2003 was filed for the same relief by the Power Agent of the respondent/defendant and the same was dismissed on 12.3.2003 itself. In such circumstances, another Application by the principal for the very same relief is not at all maintainable. He further drew my attention to the fact that I.A. No. 19988/2003 was filed on 9.9.2003, whereas the exparte decree was passed on 29.7.2002 and no petition to condone the delay in setting aside the exparte decree was filed by the respondent herein.

7. Per contra, the learned Counsel for the respondent submitted that even though there are some lapses on the part of the respondent, the same was duly considered by the trial Judge and a cost of Rs.2,500/- was imposed and in such circumstances there is nothing to interfere with and the trial should be permitted to continue to adjudicate the matter in full on merits.

8. After perusing the entire records, which were called for from the trial court, I find that there is no merit in the submissions made by the learned Counsel for the revision petitioner.

9. It is not in dispute that the suit was decreed exparte on 29.7.20 02 itself. It is also not in dispute that an Application in I.A. No. 13041/2002 was filed by one Thennarasu, styling himself as the defendant to set aside the exparte decree dated 29.7.2002. Very curiously, the affidavit was not sworn by the said Thennarasu, on the other hand the same was sworn by the junior Counsel for the respondent/ defendant herein. Further, the said Thennarasu took out another Application 1970/2003 in I.A. No. 13041/2002 to dispense with the notice on 2nd respondent in I.A. No. 13041/2002 who is none other than the respondent/ defendant herein. It is also claimed by the said Thennarasu that the respondent herein conveyed his right in the property to him and thereafter he shifted his residence to Bangalore and the respondent herein may not be a necessary party to the Application. This Application was sworn by Thennarasu himself. After dispensing with the notice as prayed for by the said Thennarasu by order dated 12.3.2003, I.A. No. 13 041/2002 was dismissed by the very same trial Judge who allowed I.A. No. 19989/2003.

10. Admittedly, this order was not at all challenged either by the said Thennarasu or the respondent/defendant.

11. On 9.9.2003 the respondent/defendant himself filed another Application in I.A. No. 19988/2003 to set aside the exparte decree. In the affidavit filed in support of the Application, the respondent herein has stated that exparte decree was passed on 29.7.2002. But he had the knowledge of the proceedings only on 7.9.2003 as he had shifted his residence to Bangalore. He also admitted in the affidavit that land alone belonged to the petitioner/plaintiff and the superstructure belonged to Thennarasu. He claimed that he had sold the property to the said Thennarasu by a registered document on 13.3.1996 and this fact was known to the petitioner/plaintiff who also gave his consent for the same. He further claimed that he was not at all served with any notice in the suit.

12. The trial Judge in his order dated 8.1.2004 observed that there is nothing on record to show that the previous application filed by Thennarasu in I.A. No. 13041/2002 was filed with the knowledge of the respondent/defendant. He further held that as the counsel for the respondent/defendant did not inform him about the stage of the case, it resulted in passing an exparte decree. The trial Judge further observed that due to communication gap between the petitioner and the counsel, he could not follow up the proceedings and he should be given one more opportunity to contest his rights.

13. I am unable to accept the reasoning adduced by the trial court either on facts or in law while allowing the Application.

14. The trial Judge misdirected himself in observing that there is no evidence to show that the earlier Application filed by the said Thennarasu is with the knowledge of the respondent herein. In fact, the trial Judge totally lost sight of I.A. No. 10693/1998 which was filed by the very same Thennarasu claiming himself as the Power of Attorney of the respondent herein to set aside an exparte order passed earlier in the year 1998, when the trial court had already admitted the said Thennarasu as the Power of Attorney of the respondent/defendant and permitted him to file I.A. No.10693/98 to set aside the exparte order earlier passed in the suit. In fact, I.A. No. 10693/98 was allowed by the trial court after accepting the reasons given by the said Thennarasu on 5.12.98. Therefore it can never be said that Thennarasu has filed earlier Application without the knowledge of the respondent herein. Only after the earlier Application filed by Thennarasu in I.A. No. 13041/2002 was dismissed on 12.3.2003, the respondent herein has filed I.A. No. 19988/2003 for the very same relief pleading ignorance about the earlier Application filed and the order obtained by Thennarasu.

15. The learned Counsel for the revision petitioner is also justified in contending that when the exparte decree was passed on 29.7.2002 itself, no petition to condone the delay was filed by the respondent herein even though I.A. No. 19988/2003 was filed

by him only on 9.9.2003. Filing a condone delay petition u/s 5 of the Limitation Act is not an empty formality and when there is a delay, the same has to be explained by the Applicant to the satisfaction of the court.

16. Hence the order of the trial court on the face of it is vitiated as it has failed to advert to the entire facts of the case and also has omitted to note that the delay was not at all explained by the respondent.

17. In view of the above facts and law, the order dated 8.1.2004 allowing I.A. No. 19988/2003 is liable to be set aside.

18. Accordingly, the order of the trial court dated 8.1.2004 is set aside and the revision petition is allowed. No costs. C.M.P. No. 3607 /2004 is closed.