

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2013

CORAM

THE HON'BLE MR JUSTICE **K.KALYANASUNDARAM**

C.R.P.(NPD).2147 of 2010
and
M.P.No.1 of 2010

S.Palani

... Petitioner

vs.

1.S.Nageswari
2.Shanthi
3.Parimala
4.Sampathkumar
5.Banumathy

... Respondents

Civil revision petition preferred under Section 115 of CPC against the order dated 25.3.2010 passed by the III Asst.Judge, City Civil Court, Chennai, in I.A.No.17263 of 2009 in O.S.No.8209 of 2006.

For Petitioner : Mr.Ravichandran Sundaresan

For Respondents : Mr.T.Sivagnanasambandan

ORDER

This civil revision petition is directed against the order dated 25.3.2010 passed by the III Asst.Judge, City Civil Court, Chennai, in I.A.No.17263 of 2009 in O.S.No.8209 of 2006.

2.The petitioner is the plaintiff in O.S.No.8209 of 2006 on the file of the III Assistant Judge, City Civil Court, Chennai. He filed the suit for partition, claiming 1/7th share in the suit property. The suit summons was not served on the defendants and on the basis of the paper publication, the respondents were set ex-parte and an ex-parte decree was passed on 6.2.2007. Subsequently, the petitioner filed an application in I.A.No.662 of 2008, for passing final decree. In the final decree application, the respondents received the summons; entered their appearance and filed the counter, on 11.8.2008. On 9.1.2009, an Advocate Commissioner was appointed and he inspected the property on 25.7.2009 and filed his report on 17.8.2009.

3.The respondents filed a petition in I.A.No.17263 of 2009, on 27.8.2009, to condone the delay of 901 day in filing an application to set aside the ex-parte decree, dated 6.2.2007. The petitioner filed his counter and objected the same. The learned III Assistant Judge, City Civil Court, allowed the petition. Aggrieved by the order, the petitioner has filed the present revision.

4.Heard Mr.Ravichandran Sundaresan, learned counsel for the petitioner and Mr.Sivagnanasambandan, learned counsel for the respondents.

5.The learned counsel for the petitioner submitted that the petitioner filed the suit in the month of October 2006, claiming 1/7th share in the suit property. All the respondents have been residing in the same address, but deliberately they did not receive the summons and the registered letters were returned un-served with an endorsement 'communication delivered, but not claimed'. The learned counsel further submitted that in the final decree application, notice was sent to the respondents in the same address; they received the notice and entered their appearance, on 21.2.2008. The respondents filed their counter, on 11.8.2008 and the counsel for the respondents, Mr.Sivagnanasambandan, was very well available in the suit property when the Advocate Commissioner visited the property, on 25.7.2009. But the respondents, after the Advocate Commissioner filed his report, dated 17.9.2009, filed the petition to condone the delay, on 27.8.2009. Since the respondents already participated in the final decree proceedings without any objection, they cannot file this application to set aside the ex-parte preliminary decree. It is further argued that even accepting that the suit summons were not served on the defendants/respondents and a preliminary decree was passed on substituted service, the respondents were very well aware of the ex-parte decree, at least, after receiving notice in the final decree

proceedings. The respondents entered their appearance in the final decree proceedings, on 21.2.2008, but they filed this application only on 27.8.2009, after 1½ years. There is absolutely no explanation for the said delay, by the respondents. The learned counsel further submitted that the allegations in the affidavit that the first respondent could not concentrate on the suit, as her relatives assured that the plaintiff will be persuaded not to make any claim and she believed the words of her relatives and well-wishers, but the plaintiff turned down their request, only due to the said reason, there occurred the delay, cannot be accepted. Hence, the order passed in the application is liable to be set aside.

6.Per contra, the learned counsel for the respondents submitted that the first respondent was the second wife of late Subramanian and the other respondents are her children born through her husband Subramanian. The petitioner and one Meenakshi are the children of her husband Subramanian born through his first wife Kokila. After the death of the husband of the first respondent, she had taken care of the entire family and she sold one property and gave major share to the petitioner. Further, the first respondent had given up her right to get compassionate appointment in the Railways and she only made

arrangements for the employment of the petitioner, but subsequently, the petitioner did not take care of the family. The learned counsel further submitted that the second and third respondents got married in the year 1996 and 2002 and they are residing with their respective husbands, but the petitioner had deliberately gave the address of the first respondent. The learned counsel further contended that the respondents had examined three witnesses and marked Exs.P1 to P3 and only on the basis of the oral and documentary evidence, the learned III Assistant Judge, had condoned the delay, which does not warrant any interference by this Court.

7.As rightly contended by the learned counsel for the petitioner that the suit was filed in the year 2006 and the suit summons was sent to the correct address of the respondents. Even as per the observation of the learned Assistant Judge, the intimation was given, but the respondents did not receive the suit summons. So, after exhausting the remedies, a substituted service was ordered and paper publication was effected. It is not the case of the respondents that they are not residing in the address given in the plaint. Subsequently, when the notice was taken to the respondents, in the final decree proceedings, to the same address, the respondents had received the

notice. It is not disputed that the respondents entered their appearance in the final decree proceedings, on 21.2.2008 and also filed their counter, on 11.8.2008. But the application to condone the delay was filed only on 27.8.2009, nearly, after 1½ year of the knowledge of the ex-parte decree passed in the suit. Hence, the reason given by the respondents is that their relatives assured that they will convince the petitioner not to make any claim against the respondents. It is also seen that when the petitioner had taken out an application for passing the final decree, in the presence of the respondents and their counsel, the Commissioner inspected the suit property. The reason given by the respondents that they believed the words of their relatives and did not take steps to set aside the ex-parte decree cannot be believed at all.

8. Admittedly, the petitioner is the legal heir of Subramanian, along with other respondents. He had claimed only 1/7th share in the suit property. Since the respondents had not shown sufficient cause for condoning the delay and their conduct shows that they wanted to drag on the proceedings, they are not entitled to set aside the ex-parte decree and the delay cannot be condoned.

9.In the result, the order dated 25.3.2010 passed in I.A.No.17263 of 2009 is set aside and the civil revision petition is allowed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

msk

20.12.2013

Index:Yes/No
Internet:Yes/No

To

The III Asst.Judge, City Civil Court,
Chennai

K.KALYANASUNDARAM,J.

Msk

Pre-delivery order in

C.R.P.(NPD).2147 of 2010

20.12.2013

