

In the High Court of Judicature at Madras

Dated: 22.09.2015

Coram:

The Honourable Mr. SANJAY KISHAN KAUL, Chief Justice
and
The Honourable Mr. Justice T.S. SIVAGNANAM

Original Side Appeal No. 128 of 2015

K. Jayaraman

.. Appellant/ Applicant/
I Defendant

vs.

1. K. Sahadevan
2. S. Delli Babu
3. S. Haribabu
4. S. Gokulakrishnan
5. K. Loganathan

.. Respondents/ Plaintiffs
2nd Defendant

Prayer: Original Side Appeal filed under Order 36, Rule 11 of Original Side Rules read with Clause 15 of the Letters Patent, to set aside the order and decree dated 21.07.2014 passed by the learned Single Judge, in Application No.3660 of 2014 in Civil Suit No. 874 of 2004 on the file of this Court.

For Appellant : Mr. V. Manohar

For Respondents : Mr. J.R.K. Bhavanantham for R1 to R4
Mr. P. Rathanavel for R5

J U D G M E N T

(Delivered by T.S. SIVAGNANAM, J.)

The first defendant in C.S. No.874 of 2004 is the appellant in this appeal. This appeal is directed against the order dated 21.07.2014 made in Application No. 3660 of 2014 in C.S. No.874 of 2004.

2. Respondents 1 to 4, as plaintiffs, filed a suit for partition and separate possession in respect of the suit property.

Though written statement was filed by the defendants, subsequently they did not appear and the Court passed an ex-parte decree on 28.04.2010. Thereafter, the second defendant, the fifth respondent herein filed an Application in A.No.3408 of 2012 to condone the delay of 714 days in filing an application to set aside the ex-parte decree dated 28.04.2010. The said application was dismissed by the learned Single Judge by order dated 10.08.2012, against which the second defendant/fifth respondent preferred an appeal in O.S.A.No.406 of 2012. A Division Bench of this Court, by judgment dated 25.02.2013, allowed the appeal and directed the parties to co-operate with the speedy disposal of the trial.

3. After the judgment was delivered by the Division Bench, the appellant herein, who is the first defendant in the suit, filed an Application in A.No.3660 of 2014 on 02.08.2013 for condonation of delay of 1163 days in filing an application to set aside the ex-parte decree. The said application was resisted by respondents 1 to 4. The learned Single Judge, by the impugned order dated 21.07.2014, dismissed the application, holding that the delay has not been satisfactorily explained and it is inordinate, against which the present appeal has been preferred.

4. We have heard the learned counsel for the parties and perused the materials available on record.

5. Learned counsel appearing for the contesting respondents namely respondents 1 to 4/plaintiffs submits that the benefit of the judgment in O.S.A.No.406 of 2012 would enure to the benefit of the appellant also, but the plight of respondents 1 to 4 is liable to be taken into consideration, since respondents 1 to 4 filed an Application in A.No.1791 of 2012 for appointment of Advocate Commissioner to inspect the suit property and to submit a report so as to give effect to the ex-parte decree dated 28.04.2010. It is his submission that since the said ex-parte decree had been set aside in O.S.A.No.406 of 2012, the costs paid to the Advocate Commissioner should be duly compensated to respondents 1 to 4/plaintiffs.

6. In the light of the fact that already the ex-parte decree has been set aside by this Court in O.S.A.No.406 of 2012 at the instance of the fifth respondent/second defendant, the benefit of the judgment should enure to the appellant also. However, in the instant case, we find that the delay is 1163 days in filing an application to set aside the ex-parte decree with a further fact that the said application was filed by the appellant only on 02.08.2013, that too after the appeal filed by the fifth respondent/second defendant was allowed by a Division Bench of this Court on 25.02.2013. Hence, respondents 1 to 4 are liable to be compensated with costs. Accordingly, the appeal is allowed and the delay is condoned and the ex-parte decree passed against the appellant is set aside subject to payment of costs of Rs.6,000/- per

head to respondents 1 to 4/plaintiffs - totally Rs.24,000/- within two weeks from today, as the fee paid to the Advocate Commissioner is Rs.25,000/-. There shall be no order as to costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

ATR

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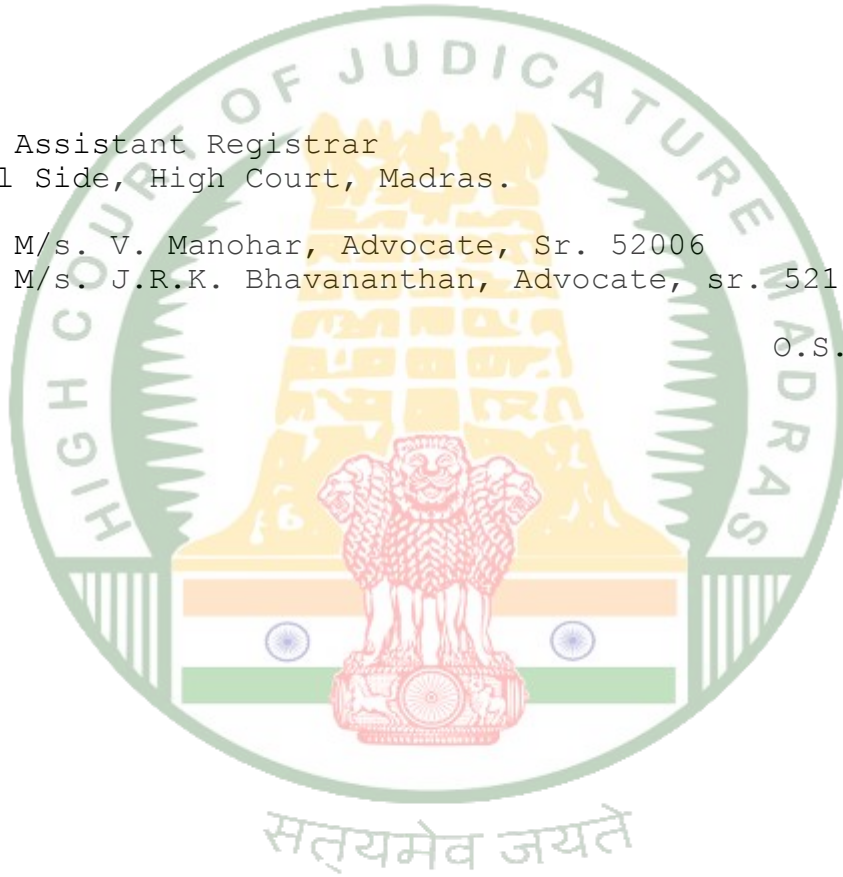
The Sub Assistant Registrar
Original Side, High Court, Madras.

1 cc to M/s. V. Manohar, Advocate, Sr. 52006

1 cc to M/s. J.R.K. Bhavananthan, Advocate, sr. 52130

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