

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(PD)No.1634 of 2011
and
M.P.No.1 of 2011

1.D.Dhanapal

2.D.Devadoss

.. Petitioners

Vs

D.Sundar

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order dated 19.01.2011 made in I.A.No.412 of 2010 in O.S.No.554 of 1995 on the file of the Subordinate Judge, Poonamallee.

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For Petitioners : Mr.S.Ganesh

For Respondent: M/s.A.S.Kailasam&Associates

ORDER

The defendants 1 and 4 in in O.S.No.554 of 1995 are the Civil Revision Petitioners before this Court, challenging the order in I.A.No.412 of 2010 in O.S.No.554 of 1995, dated 19.01.2011.

2.The respondent/plaintiff has filed the suit in O.S.No.554 of 1995, against these defendants along with other defendants for partition. On receipt of the summon, the 3rd defendant has filed the written statement denying the partition to the plaintiff.

3.The said suit was decreed exparte on 30.09.2009. Therefore, these defendants 1 and 4 were filed a petition for setting aside the exparte decree dated 30.09.2009 along with the condonation of delay in I.A.No.412 of 2010 for condoning the delay of 167 days in filing the petition for setting aside the exparte decree.

4.It is the case of these defendants 1 and 4 that though the plaintiff has filed the suit for 1/8th share and on receipt of the summon they defend the suit to engage an advocate to conduct the case. At that stage, the 3rd defendant who took incharge to follow up the case

and in this regard, he has also filed his written statement, which was adopted by these defendants 1 and 4 and other defendants. These defendants also states that in the above circumstances, under the bonafide belief that the 3rd defendant would contest the suit on behalf of all the defendants. But, on the other hand, the 3rd defendant has colluded with the plaintiff and he has left the case without appearing before the Court. Therefore, on 30.09.2009, no one appeared for all the defendants and hence, the suit was set exparte and exparte decree was passed on 30.09.2009.

5.While being so, these defendants stated that they have received the notice in I.A.No.412 of 2010 for passing final decree in the said suit in O.S.No.554 of 1995 and the Court has directing these defendants to appear on 02.06.2010. At that time only it was stated by these defendants that on verification by engaging the fresh counsel and came to know that no one was appeared in the suit and the exparte decree was passed on 30.09.2009. Therefore, on the advise of the new counsel engaged by these defendants, the present application has been filed under Order 9 Rule 13 CPC for setting aside the exparte decree along with the condonation of delay of 167 days in filing the said exparte decree dated 30.09.2009.

6.It is the case of these defendants are that the delay and their absence are not willful, but, only reason that they bonafidely believe the 3rd defendant that he would proceed the case to that effect on behalf of the defendants 1 to 7, the 3rd defendant alone filed the written statement, which was adopted by all the defendants. Therefore, these defendants 1 and 4 prayed the trial Court namely, the learned Sub-Judge, Poonamallee, to condone the delay of 167 days in filing the set aside application.

7.On receipt of the notice in I.A.No.412 of 2010, a counter affidavit has been filed by the respondent/plaintiff, denying the allegations set out in the condone delay application, since the plaintiff has states that the condone delay of 167 days in filing the set aside application is unsustainable as facts and law and the same is liable to be dismissed in limini. सत्यमेव जयते

8.The respondent/plaintiff further states that this is not the first occasion, but it was the 2nd time this application filed in I.A.No.412 of 2010, for setting aside the exparte decree along with the condone delay application and the only intention of the petitioners/defendants 1

and 4 to delay the justice to the respondent/plaintiff and hence he prayed for dismissal of the petition.

9.The respondent/plaintiff further states that earlier on first occasion they engaged one Mr.S.Krishnamoorthy, Advocate and on behalf of these petitioners they filed the petition for setting aside the exparte decree and the same was set aside.

10.The respondent/plaintiff also states that pursuant to the application for the final decree, the trial Court has appointed one Mr.V.Govindasamy, Advocate as Advocate Commissioner and he also inspected, divided the property and filed his report. But, these petitioners, who are the defendants 1 and 4 with a evil intention to provide with their respective portions to the suit property to this respondent/plaintiff, again and again, they filed these kind of petitions. Therefore, the application in I.A.No.412 of 2010 filed to condone the delay is highly belated one, this application is motivated and to create the multiplicity of proceedings and to prevent the respondents in enjoying the fruits of the decree. The respondent/plaintiff also states that the petitioners willfully and wantonly appeared before the Court, left the suit exparte, and hence the suit and the final decree should not

be set aside and without giving any valid reason for 167 days delay, this petition has been filed. Therefore, the respondent/plaintiff has prayed the trial Court for dismissal of the suit.

11.Considering the facts and circumstances of the case, the learned Sub-Judge, Poonamallee, by order dated 19.01.2011, dismissed the petition in I.A.No.412 of 2010, on the ground that though the suit was filed in the year 1995 and the trial was taken on in the year 2004. After 17 hearings, no cross examination was taken by the defendants and finally on 06.04.2009 and again the same was adjourned to 30.09.2009 but all the hearings these petitioners/defendants were not appeared and cross examine the plaintiff and therefore, they were set exparte.

12.The final hearing application was filed, which was also set aside the exparte decree and the Advocate Commissioner was appointed and inspected the property and divided the suit schedule of property and submitted his report. But, all in sudden, these petitioners/defendants have filed this application for setting aside the exparte decree.

13.The learned Judge also states that though the suit was filed for partition in the year 1995, even after lapse of 15 years, the suit was not disposed. Therefore, he dismissed the said application. Challenging the said order, the present Civil Revision Petition is filed before this Court.

14.I heard Mr.S.Ganesh, learned counsel appearing for the petitioners and Mr.Mr.A.S.Kailasam, learned counsel appearing for the respondent and perused the entire records.

15.Admittedly, the suit filed for partition. Time and again, this Court and the Hon'ble Apex Court very categorically held that the suit like partition, specific performance and declarations should not be decided exparte, since by giving fair opportunity to both the parties, the suit must be decided on merits.

16.It is admitted fact that the defendants were served the summon and appeared through their counsel, but on record it shows that the 3rd defendant alone has filed the written statement, which was adopted by all the defendants, including this defendants 1 and 4.

17.This Court considered the reason given by the petitioners/defendants 1 and 4 that they originally nominated the 3rd defendant and he only take care of the case and that would clearly proved on filing of the written statement only by the 3rd defendant. Therefore, the reason given by these defendants 1 and 4 was bonafidely believed by this Court.

18.It is the case of the petitioners/defendants 1 and 4 that the set aside application filed with the delay of 167 days, which is a meagre delay, the trial Court namely, the Sub-Judge, Poonamallee, ought to have considered that though the delay is very meagre and the suit is for partition and that could be decided only by the Court on merits and must have give an opportunity to the petitioners to putforth their case.

19.It is not the case of the defendants 1 and 4 that they admitted the claim of the suit, but when the defendants were denied the partition of the suit, then the Court must have give an opportunity to contest the suit and decide the same on merits and rendered justice to both the parties.

20. Due to the dismissal of the said application on 19.01.2011, this Civil Revision Petition was filed in the year 2011 and the same is pending unnecessarily for the past 7 years. If the Court namely the Sub-Judge, Poonamallee, looked into the facts and circumstances and the reason of the meagre delay of 167 days, he must have allowed the application and decided the suit on merits and by this time, the suit itself would have completed, but due to pendency of the Civil Revision Petition, the suit, which was filed in the year 1995 has not been completed till date.

21. Therefore, the order passed by the learned Judge in I.A.No.412 of 2010 for dismissing the application filed for condoning the delay of 167 days in filing the set aside application, is warranting interference by this Court. Accordingly, the same is liable to be set aside, on condition that the petitioners/defendants 1 and 4 should compensate the respondent/plaintiff.

22. In the result:

(a) this Civil Revision Petition is allowed by setting aside the order passed in I.A.No.412 of 2010 in O.S.No.554 of 1995, dated 19.01.2011, on the file of the

learned Sub-Judge, Poonamallee, on condition that the petitioners/defendants 1 and 4 shall pay a sum of Rs.3,000/- to the respondent/plaintiff within a period of two weeks from the date of receipt of a copy of this order;

(b) on production of the payment receipt within the time stipulated by this Court, the learned trial Court is directed to number the set aside application and pass orders within a period of 15 days, by giving notice to both the parties;

(c) on passing the order in the set aside application, the learned trial Court namely, the Sub-Judge, Poonamallee, is directed to take up the suit on day to day basis, without giving any adjournments to either parties and dispose the same within a period of two months. Both the parties are hereby directed to give their fullest co-operation for early disposal of the suit. Consequently, connected miscellaneous petition is closed.

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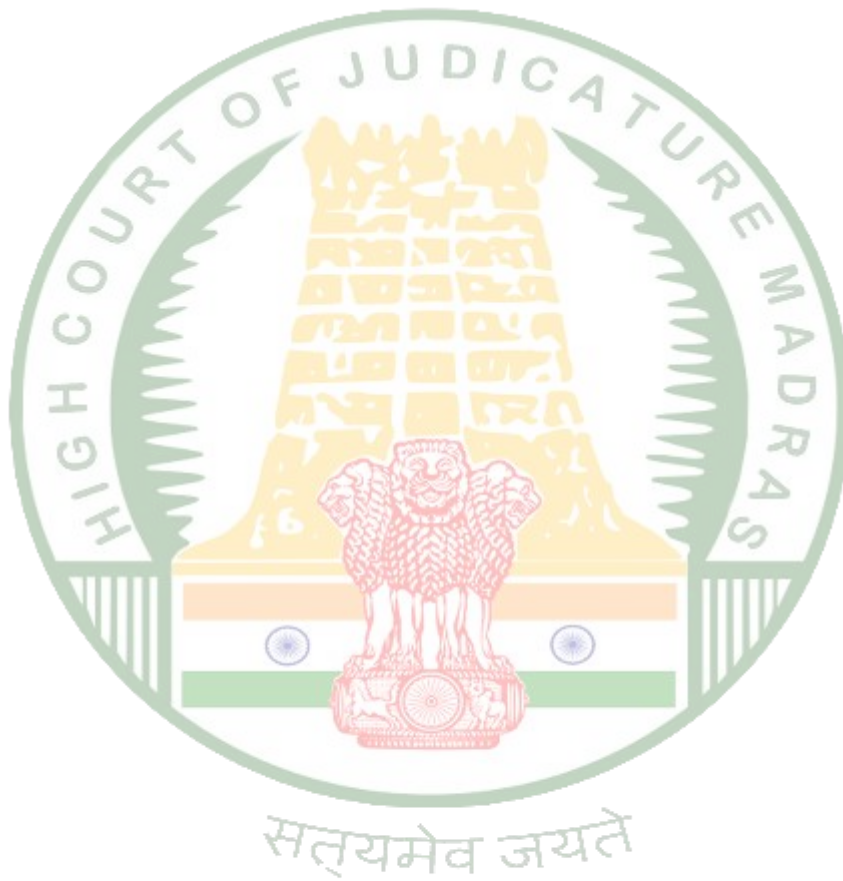
27.06.2016

Note: Issue order copy on 18.08.2017
vs

Index: Yes
Internet: Yes

To

The Subordinate Court,
Poonamallee.



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M.V.MURALIDARAN.J.,

VS



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