

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :26.08.2016

CORAM

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

C.R.P.(PD) No.4557 of 2011
and
M.P.No.1 of 2011

1.R.Thankesan
2.R.Santhi

... Petitioners

vs.

1.Rajalingam
2.Rani
3.Athimoolam
4.Minor Santhoshkumar
rep.through mother Rani
5.Sadasivam

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India praying to set aside the order dated 8.3.2011 passed in I.A.No.11 of 2009 in O.S.No.5 of 2008 on the file of the Subordinate Judge, Harur.

For Petitioner : Mr.S.Vijayakumar

For Respondents 1 to 4 : Mr.R.Govindaraj
for Mr.S.Kanniah

For Respondent No.5 : No appearance

ORDER

This Civil Revision Petition arises against the fair and decretal order made in I.A.No.11 of 2009 in O.S.No.5 of 2008, dated 8.3.2011, on the file of the Subordinate Judge, Harur, in allowing the application filed by the respondents under Section 5 of the Limitation Act seeking to condone the delay of 1965 days in filing the petition under Order 9 Rule 13 of C.P.C.,.

2. The facts of the case are that the revision petitioners filed a suit for partition on 16.4.1999 and after service of summons, the respondents entered appearance through their counsel and did not choose to contest the suit on merits. Thereafter, the suit was adjourned from time to time. Even after the suit was listed for trial, neither the respondents nor their counsel choose to appear and contest the matter on merits. After several hearings, the Trial Court set the respondents exparte and consequent upon the same, preliminary decree was passed on 12.12.2002. The revision petitioners filed a petition on 23.3.2007 in I.A.No.16 of 2007 to pass a final decree. In response to the petition for passing final decree, the respondents filed their counter affidavit on 4.8.2007. In the meanwhile, the suit was transferred to the newly constituted Subordinate Court, Harur and renumbered as O.S.No.5 of 2008. At that stage, the respondents filed I.A.No.11 of 2009 for

condonation of delay of 1965 days in filing the petition under Order 9 Rule 13 of CPC.,. In the aforesaid Interlocutory Application, counter affidavit was filed by the revision petitioners. The Trial Court allowed the Interlocutory Application without considering the objections made by the revision petitioners. Aggrieved by the said fair and decretal order passed by the Trial Court, the plaintiffs filed the present revision petition before this Court.

3. The learned counsel for the revision petitioners would submit, the respondents filed an Interlocutory Application in I.A.No.11 of 2009 in O.S.No.5 of 2008 seeking to condone the delay of 1695 days in filing the Interlocutory Application under Order IX Rule 13 of C.P.C. to set aside the exparte preliminary decree. The reasons adduced by the respondents in the affidavit are false and there was no Muchalika entered between the parties as alleged in the affidavit. The said Application was filed with a view to drag on the proceedings. The learned Subordinate Judge could have considered the contentions of the revision petitioners/respondents therein while allowing I.A.No.11 of 2009. The main reason for allowing the aforesaid Interlocutory Application is that if that application was not allowed, the petitioners/respondents herein would take the matter for revision and keep it pending for many more years and allow to drag on the matter. In view of the nature of the reason given for passing the order, the order passed by the learned Subordinate Judge,

Dharmapuri, cannot be said to be a reasoned order and the same is liable to be set aside.

4. Per contra, the learned counsel for the respondents would submit that the revision petitioners filed the suit for partition. The Trial Court passed an *exparte* preliminary decree. In order to set aside the *exparte* preliminary decree, the respondents herein filed an Interlocutory Application in I.A.No.11 of 2009 in O.S.No.5 of 2008 seeking to condone the delay of 1695 days in filing the Interlocutory Application under Order IX Rule 13 of C.P.C. to set aside the *exparte* preliminary decree. It is stated in the affidavit filed in support of the condonation of delay petition that there was a panchayat during the pendency of the suit and that a Muchalika was written by both the parties and the same was given effect to and the respondents were under the impression that the suit would have been withdrawn on account of the settlement entered into between the parties. It was further stated that the first respondent fell sick due to jaundice and it was cured only one week prior to the filing of the Application. As such, sufficient reasons were adduced by the respondents in the affidavit filed in support of the aforesaid application. Considering the facts and circumstances of the case and the reasons adduced for delay in filing the Interlocutory Application, the Trial Court allowed the Interlocutory Application with costs. Therefore, the impugned order of the Trial Court does not call for any interference by this Court.

5. Heard the learned counsel appearing for the parties and perused the materials on record.

6. The respondents herein filed an Interlocutory Application in I.A.No.11 of 2009 for condonation of delay of 1965 days under section 5 of the Limitation Act in filing an Interlocutory Application to set aside the exparte preliminary decree under Order IX, Rule 13 of C.P.C.,. In the affidavit in support of that Application, it is stated that there was Muchalika entered into between the parties, which was marked as Ex.P.3 and the dispute was settled and therefore, the respondents were under the impression that the plaintiff's/revision petitioners would have withdrawn the suit in question. In support of their contention, the respondents have also marked documents Exs.P.1 to P3 before the Trial Court. However, the said contention was disputed by the revision petitioners/respondents in the Trial Court contending that the Trial Court has not considered the objections made by the revisions petitioners.

7. The only reason for allowing the Application mentioned by the Trial Court was that if that application was not allowed, the petitioners would take the matter for revision. The relevant paragraph of the order is usefully extracted hereunder:-

"... Though there is no sufficient cause to allow this application, this court considering that

the respondents are not able to use the fruits of the decree and to dispose this suit on merits. If this application is not allowed, the petitioner would take the matter for revision and keep it pending for many more years and allow to drag on the matter. In such circumstances, this Court awarded heavy costs and thereby not to allow to drag on the matter.”

8. A perusal of the aforesaid extract reveals that the learned Subordinate Judge has not considered the matter on merits but allowed the Application on whimsical reasons. Hence, I am of the view that the matter shall be remitted back for fresh consideration of the matter on merits after affording an opportunity of hearing to both the parties.

9. In the result, the order dated 8.3.2011 passed in I.A.No.11 of 2009 in O.S.No.5 of 2008 on the file of the Subordinate Judge, Harur, is set aside and the Civil Revision Petition is allowed. No costs. The connected Miscellaneous Petition is closed. The matter is remitted back to the file of the learned Subordinate Judge, Harur, to consider the matter afresh and dispose of the same on merits and in accordance with law without being influenced by any of the observations made in this order, and after affording an opportunity of hearing to both the parties, within a period of 12 weeks from the date of receipt of a copy of this order.

26.08.2016

Index : yes / no

Internet :yes / no
asvm

To

The Subordinate Judge,
Harur.

D.KRISHNAKUMAR, J.

(asvm)

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