

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY

**C.R.P.(NPD).No.4644 of 2015
and M.P.No.1 of 2015**

C.Bhuvaneswari

... Petitioner

Vs.

1.Chengutuvan

2.C.Yamuna

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decretal order dated 07.07.2015 passed in C.M.P.No.1 of 2015 in C.M.A.No.118 of 2014 on the file of the XVII Additional Judge, City Civil Court, Chennai.

For Petitioner : Mr.R.Venkatavarathan

For Respondents : Mrs.R.T.Shyamala

ORDER

Challenging the fair and final order passed in C.M.P.No.1 of 2015 in C.M.A.No.118 of 2014 on the file of the XVII Additional Judge, City Civil Court, Chennai, the plaintiff in O.S.No.8002 of 2007 on the file of the V Assistant Judge, City Civil Court, Chennai has filed the above Civil Revision Petition.

2.The plaintiff filed the suit in O.S.No.8002 of 2007 for partition. The trial Court passed a preliminary decree on 27.01.2011.

3.Pursuant to the preliminary decree passed in O.S.No.8002 of 2007, the plaintiff filed a final decree application. As against the preliminary decree passed in O.S.No.8002 of 2007, the defendants filed an Appeal in A.S.No.317 of 2011, which was also dismissed by the Lower Appellate Court. Against the concurrent judgments and decrees of the Courts below, the defendants filed a Second Appeal in S.A.No.1097 of 2013 before this Court and the same is pending.

4.The plaintiffs filed an application in I.A.No.10793 of 2013 seeking for appointment of Advocate Commissioner to divide the suit property. Since the defendants remained absent before the trial Court, the trial Court passed an exparte order in I.A.No.10793 of 2013. Thereafter, the defendants filed an application in I.A.No.4672 of 2014 to set aside the exparte order passed in I.A.No.10793 of 2013. The trial Court, taking into consideration the case of both parties, dismissed the application in I.A.No.4672 of 2014, against which the defendants preferred an Appeal in C.M.A.No.118 of 2014 on the file of the XVII Additional Judge, City Civil Court, Chennai.

5. Before the Lower Appellate Court, the plaintiff, who was the respondent in the Appeal, remained absent on 27.10.2014 and therefore, she was set exparte. Hence, she filed an application under Order 9 Rule 7 of the Civil Procedure Code to set aside the exparte order dated 27.10.2014. In the affidavit filed in support of the petition, the plaintiff has stated that due to over-sight, her counsel failed to note down the hearing date in his diary, hence, the counsel could not appear before the trial Court on 27.10.2014. Therefore, she was set exparte and an exparte order was passed.

6. It is also brought to the notice of this Court that the plaintiff undertook to file vakalat before the Lower Appellate Court in the Appeal in C.M.A.No.118 of 2014 and the case was adjourned on 17.10.2014, 21.10.2014 and 27.10.2014 for filing vakalat of the plaintiff. Since the plaintiff failed to appear before the Lower Appellate Court, she was set exparte and an exparte order was passed on 27.10.2014. The averments stated in the affidavit filed in support of the petition were disputed by the defendants in their counter. The trial Court, taking into consideration the case of both parties, dismissed the application finding that inspite of granting sufficient time to the plaintiff, she failed to appear before the Lower Appellate Court to contest the Appeal.

7. Admittedly, the Lower Appellate Court had passed only an *ex parte* order and not a decree. Therefore, the plaintiff has filed an application only under Order 9 Rule 7 of the Civil Procedure Code. Though the plaintiff was set *ex parte* before the Lower Appellate Court on 27.10.2014, the plaintiff has filed the application to set aside the *ex parte* order on 24.11.2014 itself. No doubt, the application was numbered only in the year 2015. Since the plaintiff has satisfactorily explained the reasons for her non-appearance before the trial Court on 27.10.2014, the Lower Appellate Court could have set aside the *ex parte* order and given an opportunity to the plaintiff to contest the Appeal on merits. Admittedly, there is no delay on the part of the plaintiff in filing the application to set aside the *ex parte* order.

8. It is also pertinent to note that there is no period of limitation prescribed for filing an application under Order 9 Rule 7 of the Civil Procedure Code. The non-examination of the petitioner before the Lower Appellate Court cannot be put against her for setting aside the *ex parte* order. In the interest of justice, the Lower Appellate Court should have given an opportunity to the plaintiff to contest the Appeal on merits.

9. In these circumstances, the fair and decreetal order passed by the Lower Appellate Court in C.M.P.No.1 of 2015 in C.M.A.No.118 of 2014 are liable to be set aside. Accordingly, the same are set aside. The petition in C.M.P.No.1 of 2015 stands allowed. The XVII Additional Judge, City Civil Court, Chennai is directed to give an opportunity to the plaintiff to contest the Appeal on merits.

10. Since the Appeal is pending from the year 2014, I direct the XVII Additional Judge, City Civil Court, Chennai to dispose of the Appeal in C.M.A.No.118 of 2014, on merits and in accordance with law, within a period of one month from the date of receipt of a copy of this order.

11. With these observations, the Civil Revision Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Index : No
Internet : Yes
va

18.08.2016

To

The XVII Additional Judge,
City Civil Court,
Chennai.

M.DURAIWAMY,J.
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