

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2016

CORAM:

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.2429 of 2012

1.Nachammal

2.Ramathal

3.Valliathal

... Petitioners

Vs.

Nachimuthu Gounder

... Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order dated 19.03.2012 made in I.A.No.1062 of 2011 in A.S.No.5 of 2007, on the file of the Additional District Court/Fast Track Court No.III, Dharapuram.

For Petitioners : Mr.M.Guruprasad

For Respondent : Mr.S.Dhanasekaran

ORDER

The appellants in A.S.No.5 of 2007, on the file of the learned Fast Track Court No.III, Dharapuram, are the Civil Revision Petitioners before this Court, who filed I.A.No.1062 of 2011 for condoning the delay of 878 days in restoring the appeal in A.S.No.5 of 2007, which was dismissed for default on 12.03.2009.

2.It is the case of the petitioners, who are the defendants in O.S.No.320 of 2002 filed for partition among the respondent/plaintiff and these petitioners/defendants. A preliminary decree was passed on 22.12.2004 by the learned District Munsif Court, Dharapuram. Challenging the said preliminary decree, these petitioners who are the defendants were filed the above said appeal in A.S.No.5 of 2007 before the learned Subordinate Judge, Dharapuram.

3.Though the property was situated at Kilankundal Village and the 3rd petitioner only residing in their area and others were residing separately after their marriage, the 3rd petitioner alone has conducted the appeal in A.S.No.5 of 2007 and the petitioners' uncle namely

Mr.Duraisamy was suffering from Heart pain and there was an operation in the heart at Coimbatore Hospital and the 3rd petitioner, who accompanied the said Mr.Duraisamy in the said hospital, the petitioners 1 and 2 who are illiterate have not known about the pendency of the appeal.

4.Though the said Mr.Duraisamy was taken into hospital and operated in his heart and later on severe stomach pain, he was again taken treatment at Palani Hospital. Therefore, the 3rd petitioner accompanied Mr.Duraisamy, was not heard about the case particulars and he was unable to get the instructions from their counsel, when later on the petitioners were approaching the Advocate, he informed that on 12.03.2009 itself the appeal was dismissed for default.

5.For restoring the said appeal on 24.03.2009 itself, the restoration petition was filed in C.F.R.No.1074 of 2009 and the same was returned on 02.04.2009. The said return bundle was get mixed with other bundles in the Advocate Office.

6.While pendency of the said above application, there was a fire accident taken in the Advocate office, therefore, there was a delay to

represent the restoration petition in the Court. Hence, the delay of 878 days was taken place.

7.The non-representing the restoration petition is neither willful nor wanton, but due to the above reason, the delay was happened and hence, the petitioners prayed the learned Judge for allowing the said application.

8.A counter affidavit has been filed by the respondent denying each and every allegations.

9.The respondent in his counter stating that the reasons given by the petitioner are totally false and only to accept the condone delay application, this reason was assigned by the respondent.

10.Only with an aim to restrained the respondent from getting the relief of the decree passed in the suit, these petitioners were filed the appeal in A.S.No.5 of 2007 and the said appeal was pending for long delay due to non appearance of the petitioners in the above appeal and finally on 12.03.2009 it was dismissed.

11. Thereafter, the respondent filed I.A.No.992 of 2005 for passing final decree in that application on 13.07.2011, the learned District Munsif by order dated 13.07.2011 appointed an Advocate Commissioner and with the help of Surveyor, the property was inspected and report was filed by the Advocate Commissioner. But, due to the dragging of the proceedings, these petitioners were filed the restoration petition. The other reasons were given by the petitioners are totally false and this application for condoning the delay of 878 days, the petitioners have not given any valid reason and hence they prayed for dismissal of the said application.

12. Considering both side arguments, the learned Additional District Judge (Fast Track Court No.III), Dharapuram, was pleased to dismissed the said application on 19.03.2012. The learned Judge has states that as per I.A.No.992 of 2005, the Advocate Commissioner was appointed and he has also submitted his report and at that stage, these petitioners are filed the restoration petition.

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13. The learned Judge also given the reason that this Hon'ble Court in the judgment reported in 2009 (1) CTC 319 in which sufficient cause for condonation of delay should be given by the petitioners.

Therefore, the petitioners have not given any valid reason for huge delay and the learned Judge has dismissed the application. Challenging the said order, this Civil Revision Petition is filed for the aforesaid prayer.

14.I heard Mr.M.Guruprasad, learned counsel appearing for the petitioners and Mr.S.Dhanasekaran, learned counsel appearing for the respondent and perused the entire records.

15.Admittedly, the petitioners are the defendants in O.S.No.320 of 2002, on the file of the learned District Munsif Court, Dharapuram. It is the partition suit filed by the plaintiff, who is the respondent herein and preliminary decree was passed by the learned District Munsif Court, Dharapuram, on 22.12.2004. These petitioners who are the defendants is having every right to challenging the preliminary decree dated 22.12.2004, accordingly they have also filed A.S.No.5 of 2007 which was pending and later on it was dismissed by the learned Subordinate Judge, Dharapuram, for default due to non-appearance of the petitioners on 12.03.2009.

16.Time and again, the Hon'ble Apex Court and this Court

categorically held that the suit like partition should be disposed only on merits and not on the ground of non-appearance of the defendants. Since the partition suit should be decided only on merits in respect of partition to right over the property, though the learned District Munsif Court, Dharapuram, has passed the preliminary decree, the petitioners who are the defendants is having every right to challenge the same in the manner known to law.

17. Because of the filing of the Advocate Commissioner report in I.A.No.992 of 2005, the Court cannot dismissed with simple reason that the Advocate Commissioner has filed his report. Though the Advocate Commissioner has filed a report in I.A.No.992 of 2005, but there was no whisper about the passing of the final decree. Even otherwise final decree passed in the appeal, the petitioners, who are the defendants have every right to challenge the preliminary decree at any stage.

18. It is my absolute view that the partition suit should be disposed only on merits by giving opportunity to both the parties, the same should be decided on merits. If the suit like partition suit has been disposed on merits, no prejudice would be caused to the

respondent, who is the plaintiff. But, merely because of the dismissal of the appeal on default would not be rendered proper justice to the petitioners. In the said circumstances, this Court warranting interference in the orders passed in I.A.No.1062 of 2011, dated 12.03.2009, on the file of the learned Additional District Court (Fast Track Court No.III), Dharapuram, and the same is liable to be allowed. Though the petitioners are not approach the Court in proper manner should have compensate the respondent/plaintiff by way of money.

19.In the result:

(a) this Civil Revision Petition is allowed by setting aside the order in I.A.No.1062 of 2011 in A.S.No.5 of 2007, dated 19.03.2012, on the file of the learned Additional District Court (Fast Track Court No.III), Dharapuram, on condition that the petitioners should pay a sum of Rs.3,000/- to the learned counsel for the respondent as cost, within a period of three weeks from the date of receipt of a copy of this order;

(b) on production of the payment receipt, the learned Additional District Court (Fast Track Court No.III), Dharapuram, is directed to take the appeal in A.S.No.5 of

2007, on file and dispose the same within a period of 60 days from the date of receipt of a copy of this order, by giving opportunity to both the parties, without giving any adjournments to either parties. Both the parties are hereby directed to give their fullest co-operation for early disposal of the appeal suit.

21.12.2016

Note: Issue order copy on 29.01.2018

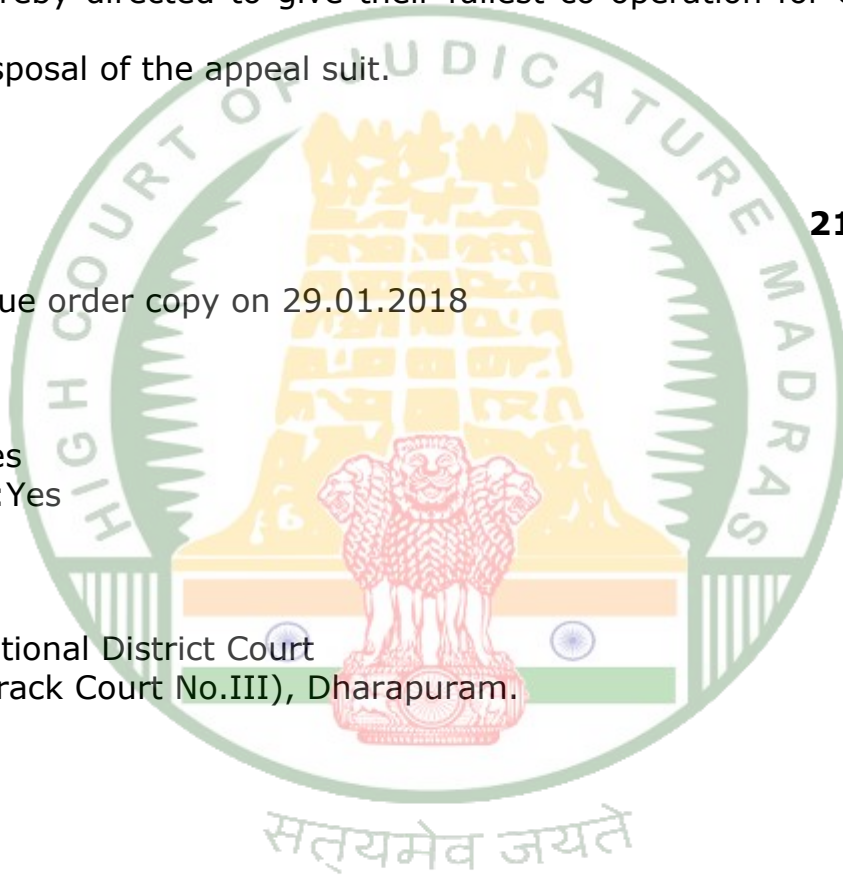
vs

Index: Yes

Internet: Yes

To

The Additional District Court
(Fast Track Court No.III), Dharapuram.



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M.V.MURALIDARAN,J.

VS



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