

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.11.2016

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THE HONOURABLE THIRU JUSTICE M. DURAISWAMY

C.R.P.(NPD) No.3556 of 2016
and CMP.No.18064 of 2016

1. Subramani
2. Thiruamal

... Petitioners

..VS..

1. Santhi
2. Vilvamani
3. Ramachandiran

... Respondents

Civil Revision Petition filed under section 115 of the Civil Procedure Code against the fair and decreetal order dated 23.03.2016 passed by the Subordinate Judge, Cheyyar, Tiruvannamalai District in I.A.No.408 of 2015 in O.S.No.64 of 2014.

For Petitioner : Dr.R.Sampathkumar

ORDER

Challenging the fair and decreetal order dated 23.03.2016 passed in I.A.No.408 of 2015 in O.S.No.64 of 2014 on the file of the Subordinate Court, Cheyyar, the defendants 1 and 2 have filed the above Civil Revision Petitions.

2. The respondents/plaintiffs filed a suit in O.S.No.64 of 2014 for

partition, separate possession and for permanent injunction. Since the defendants failed to appear before the trial Court, they were set exparte and an exparte preliminary decree was passed on 22.04.2014.

3. Thereafter, the defendants filed an application in I.A.No.408 of 2015 to condone the delay of 460 days in filing the petition to set aside the exparte preliminary decree dated 22.04.2014. In the affidavit filed by the 1st petitioner/1st defendant in support of the petition, he has stated that he was suffering from Jaundice and was taking native treatment for the ailment. Further, he has stated that the 2nd petitioner/2nd defendant, who is his brother is residing at Chennai.

4. The averments stated in the affidavit filed in support of the petition were disputed by the plaintiffs in their counter. In their counter, the plaintiffs have specifically stated that the 2nd defendant has not given any reason for his non appearance before the trial Court and if the 1st defendant was suffering from Jaundice, he could have instructed his brother/2nd defendant to have appeared before the trial Court and given instructions to the counsel to file an application to set aside the ex-parte preliminary decree. Further, in the counter, the plaintiffs have stated that the defendants received the summons in the final decree application in

I.A.No.351 of 2014 and inspite of the same, they have not filed the application to set aside the exparte preliminary decree immediately.

5. As rightly contended by the plaintiffs, when the 1st defendant was suffering from Jaundice, he could have instructed his brother, the 2nd defendant to file an application to set aside the exparte preliminary decree in time. The defendants have taken their own time to file an application to set aside the exparte preliminary decree. In the absence of any reason given in the affidavit with regard to non appearance of the 2nd defendant, the delay cannot be condoned. The defendants being brothers, in such a case, the 1st defendant could have instructed his brother to appear before the trial Court and file an appropriate application for setting aside the exparte preliminary decree. When no reason was given in the affidavit with regard to non appearance of the 2nd defendant, the trial Court has rightly dismissed the application.

6. The ratio laid down by the Hon'ble Supreme Court of India, in a Judgment reported in *(2015) 1 SCC 680 (H.Dohil Constructions Private Limited vs. Nahar Exports Limited and Another)* squarely applies to the facts and circumstances of the present case. In these circumstances, I do

M. DURAISWAMY,J.,

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not find any error or irregularity in the order passed by the trial Court.
The Civil Revision Petition is devoid of merits and hence the same is
dismissed. No costs. Connected miscellaneous petition is also
dismissed.

18.11.2016

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To
The Subordinate Judge, Cheyyar, Tiruvannamalai District

C.R.P.(NPD) No.3556 of 2016

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