

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.12.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.2687 of 2013

Muthulakshmi

.. Petitioner

Vs.

1.Allimuthu

2.Kulandaivel

3.Govindasamy

4.Sampath

5.Gopi

..Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order and decree dated 20.02.2013 made in I.A.No.204 of 2012 in O.S.No.2 of 2006, on the file of the District Munsif at Dharmapuri.

For Petitioner : Mr.A.Ilaya Perumal

For Respondents : Mrs.V.Srimathi (for R1 to R3)

No Appearance (for R4)

ORDER

The case of the revision petitioner is that she, as a plaintiff filed suit for partition as against the 1st defendant / the 1st respondent herein. The 1st defendant namely Alli Muthu is the brother of the plaintiff/ revision petitioner herein. Their father namely Pothu Raj and their mother died intestate leaving behind the revision petitioner and the 1st defendant as legal heirs to succeed his estate. The 1st and 2nd item of suit properties were purchased by the revision petitioner's father long back about 35 years ago, in the name of the 1st defendant. Though the property was purchased in the name of the 1st respondent, it was only a joint family property purchased out of the funds of revision petitioner's father. The 1st respondent had no source of income at that point of time, so as to purchase the 2nd suit scheduled of property, therefore it is absolutely a Joint family property. The suit 3rd schedule property was Sridhana property given to the revision petitioner's mother at the event of her marriage. All the suit properties were under the possession and enjoyment of the revision petitioner herein, since the 1st respondent due to his employment in Karnataka State, shifted to Kolar Gold field District.

2. Thus the revision petitioner have $1/4^{\text{th}}$ share in respect of suit 1st and 2nd schedule of property and $1/2$ Share over the 3rd schedule property. However, the 1st respondent with an ulterior motive to defeat the share of the revision petitioner, beyond the knowledge of the revision petitioner, with the aid and assistance of the respondents 2 to 5 who are the adjacent land owners of the suit properties, attempted to create encumbrance by way of creating fraudulent transactions over the suit properties. Therefore the revision petitioner has filed the above suit for partition against the 1st respondent, besides by arraying the above said parties viz., respondents 2 to 5 and prayed for her $1/4^{\text{th}}$ share in respect of suit 1st and 2nd schedule property and $1/2$ Share over the 3rd schedule property. In the said suit the 1st defendant/1st respondent herein filed Written statement and the suit was under Trial. Being so, the above said suit due to the non appearance of the counsel for the revision petitioner, as well as non appearance of the revision petitioner on 05.02.2008 came to be dismissed for default. The revision petitioner was totally unaware of the dismissal of her suit for non prosecution, further being an illiterate she was under impression that she would be called upon by

her counsel if required by the court. Therefore on receipt of information from her counsel that the suit was dismissed, she immediately filed the above I.A. in I.A.No.204 of 2012 under Order IX Rule 7 to set aside the order of dismissal of Trial court dated 05.02.2008. Though in case of suit for partition, there is no limitation prescribed, but with abundant caution the revision petitioner has filed the said I.A along with the a petition under Section 5 of Limitation Act, to condone the delay of 1444 days in filing application to set aside the dismissal of the suit for default. However, the revision petitioner's application in I.A.No.204 of 2012 came to be dismissed mechanically by the Trial court, without proper appreciation of facts. The said order is impugned herein.

3.The learned counsel for the revision petitioner submitted that the delay is neither willful nor wanton, the revision petitioner due to her illiteracy was under the impression that she would be called upon by her counsel while required by the Court. Furthermore the delay is caused only due to the counsel in the Trial court, that he has informed the dismissal of the suit belatedly. Once the revision petitioner has got the knowledge of the dismissal of the suit, immediately she has filed the above I.A.No.204 of 2012 without any delay on her part. It was further contended that the revision

petitioner being an illiterate may not be put to suffer and irreparable loss for the fault of his counsel. Furthermore the suit being the one for partition, if such a mechanical approach is adopted, the revision petitioner's right and share will be defeated.

4.Per Contra the learned counsel for the respondents submitted that the learned trial Judge having rightly found that the delay is not being explained with sufficient reasons has dismissed the revision petitioner's application. Further since the revision petitioner got married in the year 1958 itself, she is not entitled to any share. After the death of the respondent's father in the year 1982, the suit property came to the possession of the respondent and till date he is in possession. Whereas the revision petitioner since left the parental home several decades ago, on applying the principle of Ouster, the revision petitioner is not entitled to any share.

5.I heard Mr.A.Ilaya Perumal, learned counsel appearing for the petitioner and Mrs.V.Srimathi, learned counsel appearing for the respondents 1 to 3 and perused all the records.

6.On perusal of typed set of papers, at the very outset it is

found that the revision petitioner is an illiterate. Furthermore the 1st respondent admits that the revision petitioner herein and the 1st respondent himself alone were heirs of his deceased father Pothu Raj, whereas he claims that the rights envisaged under The Hindu Succession Act, 1956 is inapplicable to the revision petitioner, besides he also raises the plea of Ouster that the revision petitioner is not entitled to any share. It is noticeable that the Written Statement is silent about the source of income to the respondent, but it is barely contended that the 1st and 2nd suit schedule properties are self acquired of the respondent. Moreover it is noticeable that either parties claims exclusive possession over the suit property.

7. Therefore, this Court in the interest of justice and taking into account that the case on hand is a Partition suit and it neither for recovery of money nor for specific performance, feels that all the above said issues can be concluded and arrived at a right decision only after a complete trial.

8. It is pertinent to note that the Revision petitioner's application in I.A.No.204 of 2012 earlier stood allowed Exparte on 07.08.2012, due to the non appearance of the respondent herein. It is relevant to

note here that the reason put forth by the respondent therein in I.A. 664 of 2012 for non appearance of himself as well as his counsel on 07.08.2012, is that both of them were held up in one another Court. The same was also accepted by the trial Court.

9.At this Juncture, the claim of the revision petitioner that she was under the impression that she would be called upon by her counsel while required by the court and the revision petitioner being an illiterate lady may not be put to suffer and irreparable loss for the fault of her counsel, deserves consideration. Moreover in the interest of justice that a Right by birth ought not to be defeated on the ground of Technicality, this court feels that the delay is to be condoned and the issues deserves a decision on merits.

10.In this regard it is relevant to refer the following decisions of this court, reported in **2007(4) TLNJ 565 (Civil) in the matter of Ramakrishnan v. The A.E.E.O., Tiruvarur & Ors.** wherein it was held that "The term every day's delay should be explained, should not be viewed in pedantic way and the approach of the court must be in common pragmatic manner".

11.Another decision reported in **2000-1 L.W.547**, in the matter

of **Amudha Vs S.A.Arumugham & Ors.**, wherein it was held that condonation of delay is a matter of discretion of the court and section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within certain time. The court has to take into consideration that interests of justice require that the delay must be condoned.

12.It is needless to say that Section 5 application is required to be dealt in a pragmatic way, whereas not in a pedantic way. In this regard it is useful to refer the following Judgments of this Court in the case of **Nagarathinammal and others v. Madhammal** reported in **2014 (2) CTC 649** wherein it is held that:

“Through the other averments that the petitioners were misled by the assurance made by the Respondent / Plaintiff to withdraw the case and that the 4th Revision Petitioner had gone to outstations for the treatment of his ailing mother could be construed to be averments not substantiated and insufficient for condoning the delay, the other reason, namely the suspension of the Advocate by the Bar Council of Tamil Nadu, which was not known to the Revision Petitioners previously, can be held to be a valid

reason for seeking an order condoning delay in filing the Application to set aside the ex-parte Preliminary Decree. This Court is of the considered view that, when such is the contention of the Revision petitioner and such is the reason assigned by them, the interest of Justice requires passing of an Order giving the Revision Petitioners one more opportunity to contest the case and get a contested verdict and at the same time, direct the Revision Petitioners to compensate the Respondent/ Plaintiff by a cost of Rs.10,000/-".

13.In the case of **Sarasu v. Ravi** reported in **2016 (5) CTC 117**, wherein it is held that:

“When a Court of Law deals with an Application to condone the delay filed under Section 5 of the Limitation Act, such Application will have to be generally viewed in a liberal and lenient way to do substantial justice between the parties. By projecting an Application to condone the delay as per Section 5 of the Limitation Act, belatedly, no party will file the same with a mala fide intention. If a party files a Delay Condonation Application belatedly, he

or she runs a serious risk.

However, if an Application filed under Section 5 of the Limitation Act is allowed by this Court, to advance the cause of substantial justice, then the maximum that can happen is that a party will be allowed to take part in the main arena of legal proceedings and the main cause can be decided on merits. Per contra, if a meritorious matter is thrown out at the threshold or at early stage the cause of justice will be certainly defeated. In a Condonation of Delay Application filed under Section 5 of the limitation Act, 1963, the length and breadth of the delay are not a material/ relevant factor”.

14.I already held in a case of ***Satbir Singh Bakshi v. Saroja and others*** reported in **2016 (6) CTC 209**, I clearly made that there is no limitation for filing the petition under Order 9, Rule 7 of C.P.C. but the limitation apply only for the setting aside the exparte decree under Order 9, Rule 13 of C.P.C. The question of condoning delay of Section 5 of Limitation Act, there is no necessary condition for this case since the suit is pending and no exparte decree passed against this petitioner.

15.The Hon'ble Apex Court also clearly held that even the parties has not given any valid reason for the delay, the Court can give an opportunity and it is open to the Court to condone the delay of set aside application and permitting to take part in the proceedings at any stage of the proceedings. The Hon'ble Apex Court has categorically held in several cases and I followed the following judgment rendered by the Hon'ble Apex Court in ***Valleeswari v. Kamalakannan and another*** reported in ***2010 (1) MWN (Civil) 581*** has stated as follows:

“(2) ***Valleeswari v. Kamalakannan and another, 2010 (1) MWN (Civil) 581***, this Court held as follows:

“10.The learned Counsel appearing for the Second Defendant rightly makes out a difference in the rigors of Order 9, Rule 13, C.P.C., and the liberal constriction which is warranted under Order 9, Rule 7, C.P.C., It is a case where the proceedings are still pending adjudication. But after the termination of the lis, the Plaintiff or the Defendant invokes the provision under Order 9, Rule 7 or Order 9, Rule 13, C.P.C., as the case may be. When the Suit is terminated and the party concerned knocks at the doors of this Court to set aside the Decree passed or to restore the Suit which was dismissed for default, a

rigorous test would be applied to weigh the veracity of the reason given for the non-appearance of the party concerned. Considering the fact that the Suit is pending adjudication and no prejudice will be caused to the other side, the Petition filed under Order 9, Rule 7, C.P.C. is liberally construed.

12. This Court in *N.Ramanathan and another v. Meenakshisundaram*, 2001 (4) CTC 8, has clearly held that even if the Defendant is not in a position to substantiate the reason assigned for his non-appearance, his right to participate in the pending Trial proceedings cannot be denied. Though the Second Defendant has come out with some weak reasons for not attending the hearings before the Trial Court, the Court finds that it would be unjust in the light of the aforesaid ratios to deny his right to participate in the Trial proceedings which is pending adjudication.

13. It is true that there has been a delay of about four and half years in filing the Petition by the Second Defendant under Order 9, Rule 7, C.P.C. This Court in *Palani Nathan v. Devannai Ammal*, 1987 (2) MLJ 259, has held that for filing an Application under Order 9, Rule 7,

C.P.C., no limitation is prescribed and it is open to the Court to condone the absence of the Defendant and set aside the ex-parte Order passed as against him and permit him to take part in the proceedings at any stage of the proceedings.

16. After all, the Trial proceedings are pending before the Trial Court. Not much hardship will be caused to the Plaintiff if the Second Defendant is permitted to participate in the Trial proceedings. As rightly pointed out by the learned Counsel appearing for the Second Defendant, if the permission sought for by the Second Defendant to participate in the Trial proceedings under Order 9, Rule 7, is rejected, the Trial Court can at best pass an ex-parte Decree as against the Second Defendant. The said proceedings will give scope for the Second Defendant to invoke provisions under Order 9, Rule 13, C.P.C. There is every scope for such multiplicity of proceedings, if the right to participate in the Trial proceedings made by the Second Defendant is negated."

16.The Hon'ble Apex Court in ***Sangram Singh v. Election Tribunal, Kotah and another*** reported in ***AIR 1955 SC 425***, has

stated as follows:

"21.The Hon'ble Supreme Court also very clearly held in yet another case in Sangram Singh v. Election Tribunal, Kotah and another, AIR 1955 SC 425, has categorically held as follows:

"..28.Then comes Rule 7, which provides that if at an adjourned hearing' the Defendant appears and shows good cause for his "previous non-appearance", he can be heard in answer to the Suit " as if he had appeared on the day fixed for his appearance.

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

Participation by the Defendant in the Trial proceedings cannot be denied even if he does not show any good cause."

and another case in ***Bhanu Kumar Jain v. Archana Kumar and another*** reported in ***2005 (1) CTC 368 (SC)***. The Hon'ble Apex Court very clearly held that

"...Only at the stage when the matter has been posted for Judgment after completing the Trial proceedings, an Application under Order 9, Rule 7 of C.P.C., cannot be maintained."

17. Therefore, it is my absolute view that there is no limitation for filing application under Order 9, Rule 7 of C.P.C. for restore the suit and the said application is not maintainable only at the stage when the matter has been posted for Judgment after completing the trial proceedings.

18. Therefore, in view of the above dictum laid down by the Hon'ble Apex Court and this Court, the order of dismissal, dismissing the application in I.A.No.204 of 2012 in O.S.No.2 of 2006, dated 20.02.2012 passed by the learned District Munsif Court, Dharmapuri, is warranting interference by this Court and accordingly, the application in I.A.No.204 of 2012 is liable to be set aside. Accordingly, the said order is set aside, but on the other hand, though the delay is 1444 days in filing the set aside application that should be compensated by the petitioner to the respondent.

19. In the result:

(a) this civil revision petition is allowed by setting aside the order in I.A.No.204 of 2012 in O.S.No.2 of 2006, dated 20.02.2012, on the file of the District Munsif Court, Dharmapuri, on condition that the petitioner should pay a

sum of Rs.10,000/- to the respondents within a period of three weeks from the date of receipt of a copy of this order;

(b) on production of the payment receipt within the time prescribed fixed by this Court, the learned District Munsif Court, Dharmapuri, is hereby directed to number the Restoration Petition and to dispose the same within a period of one month, by giving notice to both parties;

(c) on passing order in the set aside application, the learned District Munsif, Dharmapuri, is hereby directed to take up the suit, on day to day basis, without giving any adjournment to either parties and dispose the same within a period of two months, since the suit is for the year of 2006. Both the parties are hereby directed to give their fullest co-operation for early disposal of the suit within the time limit fixed by this Court;

(d) the learned District Munsif Court, Dharmapuri, is hereby directed to file the compliance report, after passing judgment in O.S.No.2 of 2006, within a period of four weeks from the date of Judgment.

19.12.2016

Note:Issue order copy on 02.06.2017
Internet:Yes
Index:Yes

vs

To

The District Munsif Court,
Dharmapuri.

M.V.MURALIDARAN, J.

VS

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<http://www.judis.nic.in>