

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2016

CORAM

THE HONOURABLE Mr. JUSTICE M.V.MURALIDARAN

C.R.P.No.3810 of 2012

and

M.P.No.1 of 2012

1.M.Nagarajan

2.M.Seetharaman

3.M.Chennakrishnan

4.V.Suseela

... Petitioners

Vs.

P.S.S.Manoharan

... Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 06.08.2012 in I.A.No.178 of 2012 in O.S.No.44 of 2007 on the file of the II Additional Sub-Court, Salem.

For Petitioners: Mr.D.Shivakumaran

For Respondent : Mr.K.P.Jotheeswaran

O R D E R

This civil revision petition has been filed against the fair and decreetal order dated 06.08.2012 in I.A.No.178 of 2012 in O.S.No.44 of 2007 on the file of the II Additional Sub-Court, Salem.

2.The petitioners are the defendants in O.S.No.44 of 2007, on the file of the II Additional Subordinate Judge, Salem.

3.The case of the plaintiff is that he has filed the suit in O.S.No.44 of 2007 for declaration since the suit property is belonged to the plaintiff together with east west 25 feet width common public road as its southern boundary for the suit property and for permanent injunction.

4.The defendants also entered appearance and they were filed the written statement by denying the allegations made in the suit before the II Additional Subordinate Judge, Salem. Originally, the suit was posted for trial on 30.05.2011, on the said date these petitioners / defendants were not appeared.

Hence, the suit was decreed exparte on the same day in favour of the respondent / plaintiff. To set aside the exparte decree, these petitioners / defendants were filed I.A.No.178 of 2012 for condoning the delay of 243 days for setting aside the exparte decree dated 30.05.2011.

5.The first petitioner filed an affidavit stating that he is the kartha of the family and the petitioners 2 and 3 are the brothers and fourth petitioner is wife of deceased brother viz. M.Venkatesan.

6.The first petitioner has further stating that his wife namely Kowsalya is a Diabetic patient for the past 20 years and she went on severe ill health due to Diabetic from November 2010. The first defendant has taken his wife to Bangalore for emergency treatment and stayed at Bangalore for more than one year. After recovery from the illness of his wife, the first defendant has return back to home with his wife and thereafter, he met his counsel in his office on 24.02.2012, then only his counsel has informed that the suit was decreed exparte on 30.05.2011 due to the absence of the petitioners / defendants.

7.In the above affidavit, he also produced the relevant medical records in respect of his wife namely Kowsalya, along with the petition to show his prima facie case and he was requested the trial Court to condone the delay of 243 days in filing the application to set aside the exparte decree. On receipt of the notice, the respondent has not chosen to appear before the Court below for filing counter in the affidavit.

8.Considering the case of the petitioners, the learned II Additional Subordinate Judge, Salem was pleased to dismiss the condone delay application with costs on 06.08.2012. Challenging the said order, the petitioners / defendants filed this civil revision petition in CRP.No.3810 of 2012 before this Court.

9.Heard Mr.D.Shivakumaran, learned counsel appearing for the petitioners and Mr.K.P.Jotheeswaran, learned counsel appearing for the respondent.

10.Admittedly, the suit was filed for declaration of the suit property belongs to the plaintiff together with east west 25 feet width common public road as its southern boundary for the suit property and for permanent injunction. The petitioners / defendants already filed counter denying the allegations. The said matter has decided on merits. Though the suit was decreed exparte on 30.05.2011, and the petitioners filed setting aside application on 27.02.2012 along with condone delay application of 243 days delay.

11.The reason assigned by the first petitioner is that he has taking care of his wife Mrs.Kowsalya, who is a Diabetic patient for the past 20 years and has taken his wife to Bangalore for emergency treatment and stayed at Bangalore for more than one year, since he was kartha of the family, he could not contact his counsel and proceed the case.

12.After recovered from the illness, he has return back to home and immediately contact his counsel after knowing about the exparte decree, he filed the above application for setting aside the exparte decree. But, the learned Judge has given the reason for dismissing the application is that totally there are four defendants, the first petitioner is aged about 61 years and the fourth petitioner also aged about 56 years. It is admitted fact that the fourth petitioner is aged about 54 years on the date of suit, he was unable to attend the Court since he would have been staying along with his wife. It was not stated why other petitioners did not attend the Court for the past several hearings. The learned Judge also stated that the first petitioner is the kartha of the family, he was conducting his case is totally unbelievable and the learned Judge also stated that the petitioners / defendants are not minors, in the absence of the first petitioner, they would have attended the Court. This shows the Lethargic attitude of the petitioners in conducting the case. The petitioners are not illiterates and they know the consequences of non appearance before the Court. Hence the learned Judge, explanation offered by the petitioners is not acceptable and dismissed the application.

13.Admittedly, it is the claim of the petitioners that the suit should be considered on merits by giving opportunity to these petitioners / defendants. Time and again this Court and the Hon'ble Apex Court has directed the trial Court to consider the condone delay application filed by the concerned parties in a mercy manner and pass appropriate orders. But, in this case, only 243 days delay for setting aside the exparte decree. In my opinion, there is no prejudice would be caused, if the application for condoning the delay of 243 days by allowing with cost of Rs.2,000/- since the learned counsel appearing for the respondent vehemently opposed for allowing this civil revision petition. Hence, in the interest of justice, it is just and necessary to allow the civil revision petition on condition that the petitioners shall pay a sum of Rs.2,000/- to the respondent's counsel within a period of two weeks from the date of receipt of a copy of this order.

14.Accordingly, I am passing the following orders:

- (a) the civil revision petition is allowed by setting aside the order passed in I.A.No.178 of 2012 dated 27.02.2012 and on condition that the petitioners

should pay a sum of Rs.2,000/- to the respondent's counsel within a period of two weeks from the date of receipt of a copy of this order;

(b) further the trial Court viz. II Additional Subordinate Judge, Salem, is directed to number the set aside application and dispose the same within a period of one month from the date of receipt of a copy of this order and;

(c) after passing the order in the set aside application and thereafter the trial Court is directed to dispose the suit within a period of three months and both the parties are hereby directed to give their fullest co-operation for early disposal of the suit.

15.Hence, the Civil Revision Petition is allowed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

The II Additional Subordinate Court,
Salem.

+1cc to Mr.D.Shivakumaran, Advocate SR.49554

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C.R.P.No.3810 of 2012
and
M.P.No.1 of 2012

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