

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.08.2016

Pronounced on : 15.12.2016

CORAM

The Hon'ble Mr.Justice M.V.MURALIDARAN

CRP.No.534 OF 2012

and

M.P.No.1 of 2012

O.E.Siva Mahendran .. Petitioner

Vs

1.Inba Nila

2.Ezhil Mani

3.Amudhavalli

4.O.E.Siva Shankar

Rajeswari (Died)

5.Thenthamil

... Respondents

Prayer: Civil Revision Petition filed under Section 115 of C.P.C., against fair and decreetal order dated 26.08.2011 passed in I.A.No.278 of 2009 in O.S.No.72 of 2006 by the learned Subordinate Judge, Mettur.

Petitioner : Mr.M.Udhaya Kumar

Respondents : Mr.G.Saravanakumar (R1 to R3)

O R D E R

The plaintiff is the civil revision petitioner before this Court, challenging the order in I.A.No.278 of 2009 in O.S.No.72 of 2006 dated 26.08.2011, on the file of the learned Subordinate Judge, Mettur, by allowing the condone delay petition.

2.The case of the petitioners/proposed parties, who have filed the petition under Order 9 Rule 13 of CPC along with the petition to condone the delay of 926 days in filing the petition, to set aside the exparte decree passed against the second defendant in the suit on 22.12.2006.

3.The petitioners/proposed parties further state that the first respondent/plaintiff has filed the suit for specific performance against the defendants 2 and 3 on the basis of fraudulent sale agreement and have obtained an exparte decree on 22.12.2006. One Amudhavalli, who is the third respondent herein is the mother of the proposed parties and she died on 03.08.2008 leaving the proposed parties namely, Inbanila, Ezhil Mani and Amudhavalli and the fourth respondent one Thenthamil, who is also proposed party and one among the legal heirs of the deceased Rajeswari and they were succeeded to her estate.

4.The further case of the proposed parties is that the suit properties originally belong to one Sadasiva Chettiar, who executed a Will with regard to all the properties in favour of his wife Alamelu Ammal, which is the subject matter of the suit. As per the said registered Will dated 27.01.1937 Alamelu Ammal became the absolute owner of the properties after the death of Sadasiva Chettiar. The proposed parties also state that Alamelu Ammal and Sadasiva Chettiar have no issues and after Sadasiva Chettiar's death, Alamelu Ammal took shelter under her sister Kuppammal and her daughter one Rajamanickammal. The said Rajamanickammal died leaving 4 issues of which are Rajeswari the deceased third respondent and one Shakthivel. The said Alamelu Ammal during her life time executed a registered Will dated 12.04.1993 wherein she appointed the deceased third respondent and one Shiva Chidambaram as executors of her properties, to maintain her properties, to receive rents, to give the amounts to Rajamanickammal and Shakthivel. But, the said Rajamanickammal had no right to alienate the property. But, after her death the properties should devolve on her son Shakthivel and daughter Rajeswari and the Shakthivel is no more. Therefore, the third respondent Rajeswari has no individual or absolute right over the suit properties.

5.It is the case of the proposed parties that the deceased Rajeswari had given power to the second respondent one O.E.Shivasankar the defendant in the suit, he entered into a sale agreement with 1st respondent i.e. O.E.Siva Mahendran, the plaintiff herein, who is none other than his own brother and they have collusively filed a suit before the Court and have obtained a collusive exparte decree. On the basis of the said decree, the plaintiff has filed the Execution Petition in REP.No.18 of 2007 for execution of sale deed. In the said execution petition also they collusively obtained an exparte order. Thereafter, the plaintiff and the defendant have collusively filed an E.P.No.65 of 2007 for delivery of possession and occupants of the said properties filed a claim petition in the execution petition in REP.No.18 of 2007 and after the death of Rajeswari they have taken steps to implead

the petitioners as respondents to the said claim petition in REP.No.18 of 2007 and after the death of Rajeswari they have taken steps to implead the petitioners as respondents to the said claim petition. Therefore, only now the petitioners came to know about the exparte order.

6.They also contended that the alleged power of attorney is not a valid document as the said Rajeswari has no absolute right to alienate the property. Since the legal heirs of Shakthivel are alive and they also have rights in the suit properties. Even during the life time of Rajeswari as she tried to alienate the property effected paper publication on 24.02.2006. Prior to that the petitioners proposed parties issued a legal notice to their mother Rajeswari and Shiva Chidambaram on 25.07.2005, to which Rajeswari has given a reply dated 06.08.2005 wherein she has stated that she has not given power to anybody, since the power of attorney deed is a void. Hence, the sale agreement has entered into on the basis of the power of attorney also void in nature. Therefore, the proposed parties are claiming to that they are important parties to defend the suit proceedings. Only after the proposed parties were impleaded in the claim petition they came to know about the exparte decree passed in the suit and in execution petition. Hence, these proposed parties have filed this petition to implead themselves as a defendants in the suit and hence there is a delay of 926 days occurred in filing the petition to set aside the exparte decree and delay is neither willful nor wanton but due to the above reason it was happened. Hence, they filed the application to condone the delay petition in I.A.No.278 of 2009 for condoning the delay of 926 days in filing the set aside application under Order 9 Rule 13 of CPC and prayed the Court to allow the said application.

7.This petitioner/plaintiff has filed the counter statement for the above said condone delay application wherein he specifically denying all the averments in the petition with regard to the sale agreement and the power of attorney deed on the basis of which the sale agreement was executed by the respondent.

8.The petitioner/plaintiff also states that the proposed parties, who are totally third parties cannot question the exparte decree in the suit nor the exparte order in the execution petition. The plaintiff also states that during the life time of Rajeswari, the claim petition itself was filed and she has denied the stand taken by the claim of the proposed parties. The plaintiff also states in the counter that during the life time of Rajeswari, she has executed a Will in favour of her daughter Rani Anjugam and she has been added as a party in

the Execution Proceedings, since she has already been allowed to continue the proceedings on behalf of the deceased Rajeswari, without agitating it, the proposed parties are not entitled to maintain this petition. Therefore, the plaintiff also states that this proposed parties are not entitled to challenge the power of attorney deed or the sale agreement as the deceased Rajeswari herself has not denied it. The plaintiff also denied that they were impleaded as proposed parties in the claim petition. But, the said petition is still pending and therefore, the proposed parties have no right to file any petition for set aside the exparte decree, but only to drag on the proceedings, this petition has been filed. Apart from this, the condone delay application filed without any valid reasons to be assigned in the affidavit but as per the advice of the petitioners counsel they have filed this petition cannot be a reason to condone the delay and each and every days delay has not been properly explained. But, in the case on hand, they have not stated anything. Therefore, the condone delay petition must be dismissed. Accordingly, the plaintiff prayed for the dismissal of the petition.

9.Considering both side arguments, the learned Subordinate Judge, Mettur was pleased to allow the application on 26.08.2011 by condoning the delay of 926 days in filing the set aside application on the ground that the main ground alleged by the proposed parties that it is not the rule of law that necessary parties to the suit can file petition to set aside exparte decree but even the third parties can file the petition to set aside the exparte decree and in support of his arguments he produced the decision held by this Court in 2001 (3) CTC 452 (M.P.Kanoi and 4 others v. Mr.Palani Prop. M.P.Builders, residing at V-28-A, Zakaria Colony Main Road, Choolaimedu, Chennai-24).

10.Apart from this, the learned Judge also states that when they are the legal heirs of the deceased Rajeswari, they must implead as parties and hence, the learned Judge allowed the said condone delay petition. Challenging the said order, this petitioner/plaintiff has filed this civil revision petition before this Court.

11.Admittedly, the proposed parties are the necessary parties in the proceedings, since they are the legal heirs of the deceased Rajeswari. As per the Will dated 27.01.1937, it is a case of the proposed parties, the deceased Alamelu Ammal, during her life time, executed a registered Will on 12.04.1993. As per the Will cited above, the deceased Rajeswari and one S.G.SivaChidambaram, son of Seerkali Govindarajan, as executors

of the properties i.e. to maintain the properties, to receive all the rents from the tenants and to give the amounts to Rajamanickam Ammal and Sakthivel, after paying the necessary charges for the building to concerned authorities and after looking after the maintenance charges. But, as per the Will, the said Rajamanickammammal had no right to alienate the property. Therefore, thus being the case, the proposed parties, who are the legal heirs of the deceased Rajeswari have right to enter into the suit as a parties. The trial Court have also jurisdiction to try whether the Will dated 27.01.1937 and 12.04.1993 are true one and genuine one. This Court and the Hon'ble Apex Court very categorically held that the necessary parties alone should not implead and set aside the exparte decree, but, the right should have accrued either in personal rights or third party rights also can filed the set aside application. This was clearly held by this Court in 2001 (3) CTC 452 (M.P.Kanoi and 4 others v. Mr.Palani Prop. M.P.Builders, residing at V-28-A, Zakaria Colony Main Road, Choolaimedu, Chennai-24).

12.It is open and out of the Court that any one have interested to enter into the suit by way of the filing of the application for impleading themselves either to claim or claiming that they are the legal heirs of the persons, who have already on the proceedings and in the case in hand, this proposed parties, who are the legal heirs of the deceased Rajeswari since she was also a party in O.S.No.72 of 2006 and they are the daughters of the deceased Rajeswari, they are every right to implead as parties in the suit proceedings.

13.To support his case, this petitioner/plaintiff has produced a citation rendered by this Court in 2012 1 CTC 849 (R.Jagadeesan & others v. Santhakumari) in which it was stated that the defendant was aware of ex parte decree on the day when he was set ex parte, even after entering appearance in Execution proceedings no steps taken for considerable period of time. Merely filing an Application to set aside ex parte decree and leaving matter there at, does not show due diligence but only callousness and irresponsible attitude. Dismissal of Condonation of Delay Petition is correct. But in this case the proposed parties are now one aware of the suit and they are not the party in the suit. Hence, the judgment is referred above is not applicable to this case.

14.As per the judgment mentioned in para-11, it is made clear that even the third party can file the set aside applications, but here the proposed parties, who are the legal heirs of the deceased Rajeswari have filed the application for

set aside the exparte decree and hence they must have implead as a party defendant in the suit proceedings.

15.Though, they have filed the set aside application with a delay of 926 days, they have given the absolute reason for condoning the delay, since the proposed parties have not known about the Court proceedings and later on only they know the same since they are the legal heirs of the deceased Rajeswari through the first husband, they must be implead as a party defendant. Therefore, the Court below have given leniency in condoning the delay, but the trial Court is allowed the application on cost of Rs.1,500/- to this petitioner/plaintiff. Therefore, there is no necessity warranting interference by this Court in the order passed by the Court below.

16.In the result:

(a)this civil revision petition is dismissed by confirming the order passed in I.A.No.278 of 2009 in O.S.No.72 of 2006 dated 26.08.2011, on the file of the learned Subordinate Judge, Mettur

(b)the trial Court is directed to number the set aside application and pass orders within a period of one month from the date of receipt of a copy of this order, by giving notice to both the parties;

(c)after passing the orders in the set aside application, the trial Court is hereby directed to dispose the suit within a period of four months thereafter and both the parties are hereby directed to give their fullest co-operation for the early disposal of the suit. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

vs

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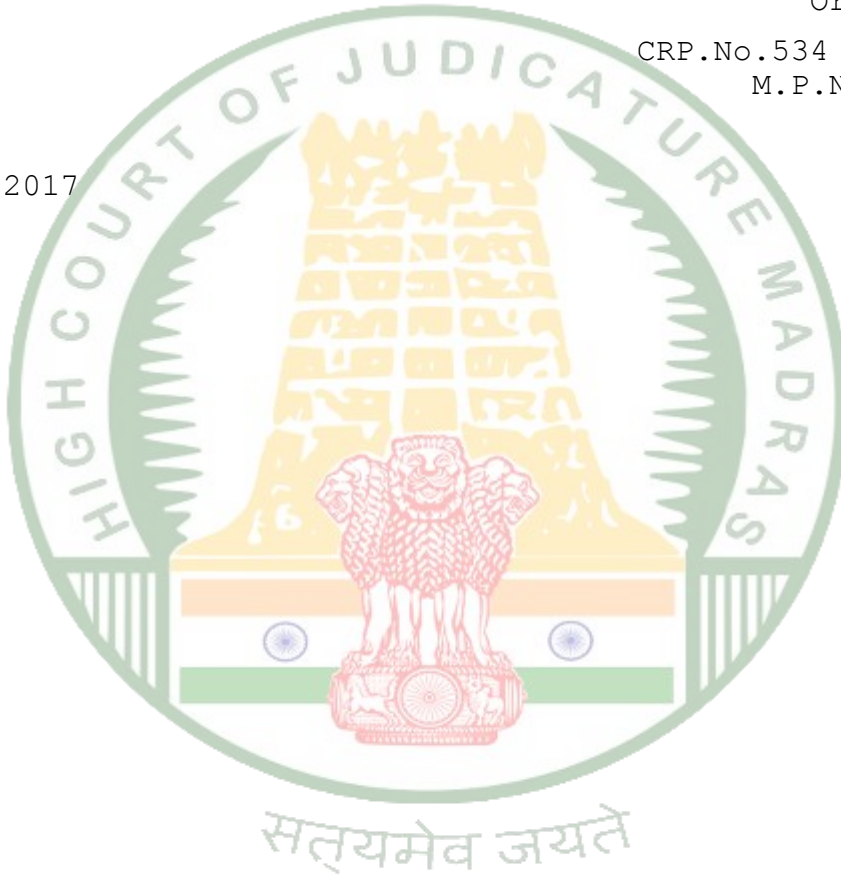
To

The Subordinate Judge,
Mettur.

+1cc to M/s M.Udhaya Kumar, Advocate Sr.73118

Order made in
CRP.No.534 of 2012 and
M.P.No.1 of 2012

RP (CO)
RVR 10/01/2017



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