

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.04.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1113 of 2017
& C.M.P.No.5390 of 2017

R.Susila

.. Petitioner

Vs.

Senbagavalli (died)

1.K.Rajendaran

Saroja (died)

2.M.Selvaraj

3.Latha Mahesh

4.Sathis Kanna

5.Rajarathinam

6.Dhanalakshmi

7.Sivashanmugam

8.Krishnakumar

Respondents

..

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order dated 23.01.2017 passed in I.A.No.29 of 2016 in I.A. No.289 of 2013 in O.S.No.173 of 2000 on the file of the Sub Court, Gobichettipalayam, Erode District.

For Petitioner : Mr.V.P.K.Gowtham

For Respondents : Mr.P.Valliappan for R1

ORDER

This Civil Revision Petition has been filed against the order dated 23.01.2017 passed in I.A.No.29 of 2016 in I.A. No.289 of 2013 in O.S.No.173 of 2000 on the file of the Sub Court, Gobichettipalayam, Erode District.

2.The petitioner is the second defendant and one Saroja filed the suit in O.S. No.173/2000 on the file of the Subordinate Judge, Gobichettipalayam, for partition and for appointing a Commissioner to divide the property by metes and bounds into eight shares and allot 1/8th share to her against Sambagavalli/first defendant, now deceased, Suseela/the petitioner herein/second defendant, Rajendiran/third defendant and defendants 4 to 7 and the said O.S. No.173/2000 was re-numbered as O.S. No.12 of 2001 on the file of the Fast Track Court No.II, Gobichettipalayam.

3.A preliminary decree was passed on 27.03.2002. The first defendant filed I.A. No.28A of 2007 to condone the delay of 1890 days in filing the application to set aside the exparte preliminary decree with an application in I.A. No.46 of 2010 to set aside the

exparte decree. While so, the plaintiff died. The respondents 2 to 4 filed I.A. No.56/2008 to implead them as legal heirs of the plaintiff. All the three applications were dismissed. The parties filed C.M.A. No.3701 of 2010 and CR.P. Nos.4395 and 4413 of 2010 before this Court against the said applications. By order dated 24.11.2011, this Court allowed all the applications. As per the orders of this Court, I.A. No.28A of 2007 was re-numbered as I.A. No.289 of 2013 and respondents 2 to 4 were impleaded as legal heirs of the plaintiff. When the said application was pending, Sambagavalli/first defendant died. The legal heir of the said Sambagavalli namely Rajendran continued the suit as third defendant and he filed an application in I.A. No.29 of 2016 for receiving the additional affidavit in I.A. No.289 of 2013 stating that when his mother Sambagavalli/ first defendant filed I.A. No.28A of 2007, she was suffering from illness and failed to furnish certain important particulars to the Advocate, who appeared on her behalf and only after death of his mother/the first defendant, when the first plaintiff started conducting case, he came to know about the same and filed additional affidavit and I.A. for receiving the same.

4.Respondents 2 to 4 filed a separate counter affidavit

opposing the said application. They contended that the first respondent is not entitled to improve the case of the deceased Sambagavalli and having stepped into the shoes of her, he cannot take any contradictory stand than the stand taken by Sambagavalli. The suit is of the year 2000. Only to drag on the proceedings, the first respondent has come out with the present petition. They also contended that there is no provision in Civil Procedure Code for filing additional affidavit. The learned Judge allowed the application on payment of cost of Rs.1,000/- each to respondents 2 to 4 and the fifth respondent holding that when there is a provision for filing additional affidavit to incorporate the left out facts in the suit, a party is entitled to file additional affidavit in Interim application. The first respondent, who is conducting the case, only can file affidavit and is entitled to file additional affidavit in I.A. The learned Judge also held that the first respondent has filed the application to set aside the exparte preliminary decree and he must be given an opportunity to prove his case.

5. Aggrieved over the same, the present revision is filed. In the revision, except first respondent all other respondents are

given up.

6.Learned counsel for the petitioner raised the following contentions:

(1)The first respondent has stepped into the shoes of the deceased Sambagavalli, who alone filed application to condone the delay and to set aside the exparte decree.

(2)The Court can consider the reason given by the said Sambagavalli to condone the delay in filing application to set aside the exparte preliminary decree and can allow the application only if Court is satisfied with the reason given by the parties are valid and sufficient for allowing the application.

(3)The first respondent who is the third defendant in the suit did not file any application to set aside the exparte decree.

(4)The first respondent cannot take a different or contradictory stand than that of the stand taken by Sambagavalli.

(5)In the present case, the first respondent is not entitled to file any affidavit as he is not the original applicant in I.A. No.28A of 2007.

(6)The learned Judge is not correct in observing that the first

respondent as a third defendant is entitled to file additional affidavit. (7)The learned Judge having rightly taken note of the fact that this Court directed the Trial Court to dispose of the application within three months, erred in allowing the application to receive additional affidavit after 10 years of filing proof affidavit by the deceased Sambagavalli.

7.Per contra, the learned counsel appearing for the first respondent submitted that the first respondent has been impleaded as per the orders of this Court as second petitioner in I.A. No.289 of 2013 (earlier I.A. No.28A of 2007). The first respondent alone is now prosecuting the I.A. No.289/2013 and therefore, he is entitled to file additional affidavit to substantiate that there are sufficient reasons to condone the delay and to set aside the exparte preliminary decree. The procedure contemplated for filing additional pleadings in the suit applies for filing additional affidavit in I.A. Due to her illness, his mother Sambagavalli failed to furnish necessary particulars to the Advocate for filing application to condone the delay. Now the first respondent has furnished the necessary particulars by way of filing additional affidavit. The learned Judge has considered the entire materials on

record and allowed the application and there is no error in the said order.

8.Heard both sides and perused the materials placed on record.

9.The issue to be decided in this petition is whether the first respondent is entitled to file additional affidavit in I.A. No.289 of 2013 earlier filed by his mother Sambagavalli in I.A. No.28A of 2007.

10.One Saroja since deceased filed O.S. No.172 of 2000 against Sambagavalli and 7 others including the petitioner and first respondent. An exparte preliminary decree was passed on 27.03.2002. Except Sambagavalli, other defendants did not file application to set aside the exparte preliminary decree. The said Sambagavalli filed the application to set aside the exparte decree with application to condone the delay of 1890 days in filing the application to condone the delay. According to the said Sambagavalli, she along with defendants 4, 6 and 7 engaged same Advocate and were conducting the case. Due to her old age, she could not contact her Advocate and only other defendants were

conducting the case. They did not inform her about the hearing of the case. Therefore, ex parte preliminary decree was passed. She came to know about the ex parte preliminary decree only when the Advocate Commissioner inspected the property and measured the same and when she received a notice in I.A. No.20/2007.

11.The first respondent has filed additional affidavit contrary to the affidavit filed by his mother Sambagavalli. The learned Judge committed error in holding that the first respondent as third defendant is entitled to file additional affidavit. The learned Judge failed to see that the first respondent as a third defendant has not filed any Application to set aside the ex parte preliminary decree. The Application to condone delay had been filed by Sambagavalli giving reasons for the delay. The first respondent is not entitled to file any additional affidavit taking a contrary stand taken in the original application filed by Sambagavalli. The Application to condone delay filled by Sambagavalli can be disposed only by considering the reason given by her to condone the delay.

12.It is pertinent to note that the said Sambagavalli has stated that she engaged same Advocate along with defendants 4, 6 and 7. Considering all these facts I hold that the learned Judge

committed irregularity in allowing the application, permitting the first respondent to file additional affidavit. The first respondent can stand or fall based on the averments made by Sambagavalli and he cannot improve the reason given by her or can take contradictory stand.

13.In the result, this Civil Revision Petition is allowed and the order dated 23.01.2017 passed in I.A.No.29 of 2016 in I.A. No.289 of 2013 in O.S.No.173 of 2000 on the file of the Sub Court, Gobichettipalayam, Erode District is set aside and I.A. No.29 of 2016 is dismissed. Consequently, connected M.P. is closed. No costs.

21.04.2017

Speaking/Non-speaking order
Index : Yes
vga

To

The Sub Court, Gobichettipalayam,
Erode District

V.M.VELUMANI, J.

vga

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