

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.04.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD) No.1153 of 2017

and

C.M.P.No.5511 of 2017

Kalaiselvi .. Petitioner/3rd Defendant
Vs.

1. U.Tamil Selvi
2. Mahalakshmi @ Vetri Selvi .. Respondents/Plaintiff

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India praying to set aside the order in I.A.No.152 of 2013 in O.S.No.279 of 2006 dated 08.02.2016 on the file of the learned Principal District Judge, Kancheepuram at Chengalpattu pending disposal of the CRP.

For petitioner : Mr.S.Sathishkumar

ORDER

This Civil Revision Petition has been filed against the order dated 08.02.2016 passed in I.A.No.152 of 2013 in O.S.No.279 of 2006 by the learned Principal District Judge, Kancheepuram at Chengalpattu.

2. The petitioner is the third defendant, first respondent is the first defendant and the second respondent is the plaintiff in the suit in O.S.No.279 of 2006. The second respondent filed the above suit for partition claiming 1/4th share in the schedule mentioned properties by metes and bounds and also good and bad soil together with income from the date of plaint till the date of delivery of separate possession.

3. An ex-parte preliminary decree was passed on 21.01.2009 in O.S.No.279 of 2006. The final decree was passed on 09.03.2012. The first respondent filed I.A.No.152 of 2013 to set aside the ex-parte preliminary decree and filed I.A.No.151 of 2013 to set aside the final decree dated 09.03.2012. According to the first respondent, suit summons were not served on her and the petitioner knowing fully well that the first respondent's husband is not residing at T.Nagar address, which was mentioned in the plaint and was residing at Bangalore, Karnataka State, sent summons to T.Nagar Address. Without serving the suit

summons on the first respondent, the second respondent effected paper publication and completed service on the first respondent. The first respondent came to know about the suit and ex-parte preliminary decree, when the neighbours of the suit property informed her about the demolition of the building in the suit property. Immediately, she filed the present application in I.A.No.152 of 2013 to set aside the ex-parte preliminary decree. She also contended that the second defendant, who is the brother of the respondents and the petitioner, is mentally ill-person and his whereabouts were not known to the petitioner and respondents.

4. The second respondent/plaintiff filed counter affidavit and opposed the said application and submitted that the first respondent was aware of the suit proceedings and that the respondents 1 and 2 have adjudicated the Second Appeal before this Court. Before the Judges summons were taken out by the first respondent to the second respondent, the second respondent was examined as a witness. She has stated that the suit summons sent to earlier address would have been re-directed to the present address of the first respondent.

5. The learned Judge, considering the averments made in the affidavit, counter affidavit and considering the fact that the summons was not served on the first respondent, the second defendant is mentally ill-person and he was not represented by his guardian before the Court and also he did not appear in the Court, allowed the application by setting aside the preliminary ex-parte decree.

6. Against the order of the trial Court dated 08.02.2016 made in I.A.No.152 of 2013 in O.S.No.279 of 2006 on the file of the learned Principal District Judge, Kancheepuram at Chengalpattu, the present Civil Revision Petition is filed by the third defendant in the suit.

7. The learned counsel appearing for the petitioner submitted that the petitioner was not made as a party to the interlocutory application in I.A.No.152 of 2013 seeking to set aside the ex-parte preliminary decree and no notice was issued to the petitioner. The order passed by the trial Court, without hearing the petitioner, is invalid and the first respondent has filed an application after four years of preliminary ex parte decree and hence it is barred by limitation. As per Article 123 of the Limitation Act, an application to set aside the ex-parte decree has to be filed within 30 days from the date of decree or from the date of order, when the suit summons were served on the parties, in other cases from the date of knowledge. It is for

the first respondent to substantiate her case that when she got knowledge of the decree. The application filed to set aside the ex-parte decree after four years, without filing an application to condone the delay, is not maintainable.

8. Heard the learned counsel for the petitioner and perused materials available on record.

9. The petitioner is the third defendant in the suit. She filed a written statement supporting the claim of the second respondent/plaintiff and she did not contest the suit. An ex-parte preliminary decree was passed, against which, the first respondent filed I.A.No.152 of 2013 to set aside the preliminary decree stating that the suit summons was not served deliberately on her. Subsequently, she came to know about the ex-parte preliminary decree, only when the neighbours informed her about the demolition of the suit property. The first respondent also stated that second defendant, who is the brother of the parties, is mentally ill-person.

10. The learned Judge, taking into consideration the evidence of the second respondent, wherein she admitted that the suit summons was not served on the first respondent and the fact that no guardian was appointed for second defendant either on the application by the second respondent or petitioner or any Court guardian, set aside the ex-parte preliminary decree.

11. The contention of the learned counsel for the petitioner that the order passed to set aside the exparte preliminary decree is invalid on the ground that the petitioner is not impleaded as party to the application and no notice was served on the petitioner is untenable. The petitioner remained ex-parte in the suit and she is supporting the case of the second respondent. The petitioner has not taken any steps to get impleaded herself as party in the application filed seeking to set aside the exparte preliminary decree filed by the first respondent.

12. From the records, it is seen that the trial court in spite of averments made in the plaint that the second defendant is mentally ill-person did not appoint Court guardian to protect the interest of the second defendant and thereby committed illegality in passing the preliminary decree and subsequently, passing the final decree on 09.03.2012. The learned Judge considering all these aspects, allowed the application by exercising his power conferred on him properly. There is no infirmity or irregularity in the said order warranting interference by this Court.

13. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (J)

/true copy/

Sub Asst. Registrar

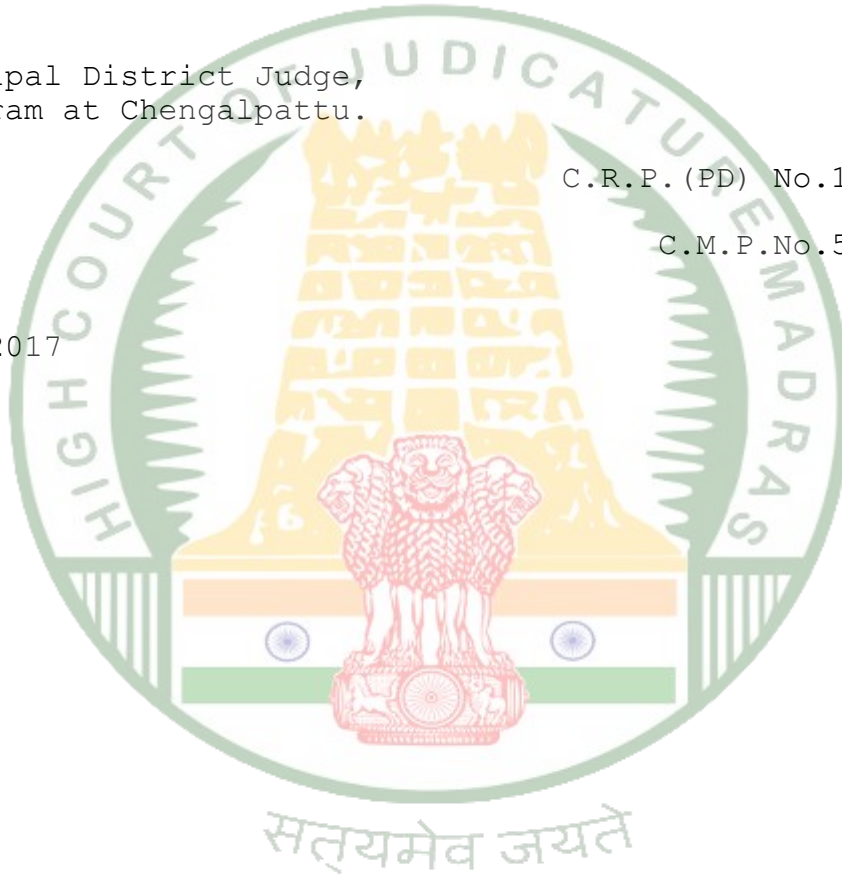
msm/kal

To

The Principal District Judge,
Kancheepuram at Chengalpattu.

C.R.P. (PD) No.1153 of 2017
and
C.M.P.No.5511 of 2017

RV (CO)
NR 21/06/2017



WEB COPY