

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.272 of 2014
& M.P.No.1 of 2014

Moidheen Abdul Khadar .. Petitioner

Vs.

1.Sabia Ummal
2.Fathima Nachiar
3.Ahmed Maracayar
4.Rabiyathul Adhalia
5.Sariba Nachiar .. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Consitution of India against the fair and decretal order passed in I.A.No.12 of 2011 in O.S.No.32 of 2009 dated 06.09.2013 on the file of the Court of Subordinate Judge, Nagapattinam.

For Petitioner : Mr.A.Muthukumar

For R1 to R3 : M/s.N.S.M.Md.Jafaruallah

For R4 & R5 : exparte

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ORDER

This Civil Revision Petition has been filed against the fair and decretal order passed in I.A.No.12 of 2011 in O.S.No.32 of

2009 dated 06.09.2013 on the file of the Court of Subordinate Judge, Nagapattinam.

2.The petitioner is the third defendant, respondents 1 to 3 are the plaintiffs and respondents 4 & 5 are the defendants 1 and 2 in O.S.No.32 of 2009. The respondents 1 to 3 filed the said suit against the respondents 4 & 5 and the petitioner for partition. The defendants did not appear and contest the suit. An exparte preliminary decree was passed on 06.08.2009. The petitioner filed I.A.No.12 of 2011 to condone the delay of 352 days in filing the petition to set aside the exparte preliminary decree. According to the petitioner, the summons in the suit were not served on the defendants and they came to know about the exparte decree only when the petitioner filed E.P to execute the decree obtained by him in O.S.No.68 of 2007. The petitioner got the documents through the Advocate and filed the present application to condone the delay in filing the petition to set aside the exparte decree. The petitioner has filed the present application within 30 days from the date of knowledge with the application to condone the delay. The petitioner also filed written statement along with the said application.

3.The third respondent filed counter affidavit and denied all the averments made in the affidavit filed in support of the above application. According to the third respondent, the petitioner/third defendant was not in India when the present application was filed. He was in Singapore on that date. The reason given by the petitioner is not valid reason and it is not correct to state that he came to know about the exparte decree only when the petitioner filed E.P to execute the decree obtained by him in O.S.No.68 of 2007.

4.Before the learned Judge, the petitioner examined himself as PW1 and one Syed Ibrahim as PW2 and marked 10 documents as Exs.A1 to A10. The respondents examined third respondent as RW1 and did not mark any documents. The marriage register of the petitioner was marked through PW2 as Ex.X1.

5.The learned Judge, considered the averments in the affidavit, counter affidavit, materials on record, oral and the documentary evidence let in by the parties and dismissed the application, holding that the person who gave evidence claiming to

be third defendant is not third defendant and the petitioner has not proved that he was in India on the date of filing the petition.

6. Against the said order of dismissal dated 06.09.2013, made in I.A.No.12 of 2011 in O.S.No.32 of 2009, the present Civil Revision Petition is filed by the petitioner.

7. The learned counsel for the petitioner contended that the respondents have obtained ex parte preliminary decree by playing fraud on the Court. They suppressed earlier proceedings in O.S.No.207 of 1987 and A.S.No.254 of 1992 and obtained ex parte preliminary decree. The learned Judge erred in accepting the contention of the respondents that person who filed the affidavit and gave evidence is not the third defendant. The learned Judge failed to see that the respondents failed to prove their contention that the person who filed the affidavit and gave evidence is not third defendant. The learned Judge erred in placing the burden on the petitioner to prove that he is the third defendant. The learned counsel for the petitioner further contended that the learned Judge failed to see that the third respondent, who was examined as RW1 has stated that he did not see the suit summons being served on

the petitioner and he has stated that he does not know from whom they obtained signature. In spite of the same, the learned Judge has held that the respondents have proved that suit summons were served on the petitioner/third defendant. The learned Judge failed to see that respondents have failed to prove that the signature in the acknowledgement is that of the petitioner. The petitioner has stated in his evidence that he was in India and he only signed the affidavit filed in support of the above petition. The learned Judge erred in placing the burden on the petitioner to prove that he is third defendant and he was in India on the date of signing the affidavit. On the other hand, it is for the respondents to prove that the petitioner is not third defendant and he was not in India when the affidavit was signed. The respondents have not produced any evidence to disprove the contention of the petitioner. The learned Judge did not mark the acknowledgements as exhibit and also the summons alleged to have been served on the third defendant as Court documents.

8. Per contra, the learned counsel for the respondents submitted that the suit summons were served on the third defendant/petitioner. The third respondent only identified the house

of the third defendant and suit summons were served on the third defendant. Similarly, private notice sent by RPAD with acknowledgement was received by the third defendant. Having received the suit summons, the third defendant did not contest the suit, as he is not interested in the suit properties. The petitioner is impersonating as third defendant. The signature in the acknowledgement as well as in the affidavit filed by the petitioner are different and petitioner admitted the same in the cross examination. This clearly shows that the petitioner is not third defendant and he has not produced any evidence to prove that he is the third defendant.

9. Heard the learned counsel for the petitioner as well as the respondents 1 to 3 and perused the materials available on record.

10. The respondents 1 to 3 filed O.S.No.32 of 2009 against the respondents 4, 5 and petitioner for partition. An exparte preliminary decree was passed on 06.08.2009. The petitioner filed I.A.No.12 of 2011 to condone the delay of 354 days in filing the petition to set aside the exparte decree. According to the petitioner,

the suit summons were not served on him. The respondents suppressed the dismissal of the earlier proceedings in O.S.No.207 of 1987 and A.S.No.254 of 1992 filed by the fourth respondent against the vendor of the petitioner and respondents 1 to 3 and 5 for partition. By the judgment and decree dated 30.10.1990, the said suit was dismissed. The petitioner has filed a copy of the said judgment in the additional typed set of papers. According to the petitioner, the suit summons were not served on him. On the other hand, it is the case of the respondents that suit summons were served on the third defendant and third respondent only identified the house of the third defendant. The learned Judge held that third respondent proved that suit summons were served on the third defendant. On the other hand, the third respondent, in his evidence as RW1 has stated that he identified the house of the third defendant and that he was not aware on whom the suit summons were served. In view of this admission by the third respondent, the learned Judge erred in holding that third respondent proved that suit summons sent to the third defendant was served on him and thereby committed an irregularity. Similarly, the respondents have not proved that private notice sent to the third defendant was served on him. There is nothing on record to show as to who has

received the private notice i.e., whether the third defendant received notice or some other person has received the private notice. For the above reason, I hold that the suit summon and private notice was not served on the third defendant.

11.As far as the contention of the respondents that petitioner is not third defendant is concerned, it is for the respondents to prove the same by letting in acceptable evidence. Except the interested evidence of third respondent, no other person was examined to substantiate their case. On the other hand, the petitioner has marked 10 documents including original passports marked as Exs.P8 to P10. The learned Judge rejected these exhibits on the ground that these passports are expired Indian passports. The respondents have not alleged and proved that third defendant is having a passport and the same is in force and the third defendant was in Singapore during relevant period. The petitioner also examined Syed Ibrahim, an official from the Administrative committee of Jamad, as PW2 and produced the xerox copy of the marriage register to show that petitioner/third defendant got married to Hanees Banu. The said xerox copy was marked as witness document No.1. The respondents have not produced any

evidence contra to the evidence let in by the petitioner. The learned Judge, by rejecting the document produced by the petitioner and relying on the summons and acknowledgement without marking the same as Court exhibits, committed an irregularity in holding that the petitioner failed to prove that he is third defendant and he was in India when the present application was filed.

12. In view of the same, the order of the learned Judge is liable to be set aside and is hereby set aside. Accordingly, this Civil Revision Petition is allowed. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed.

04.12.2017

Index: Yes/No
gsa

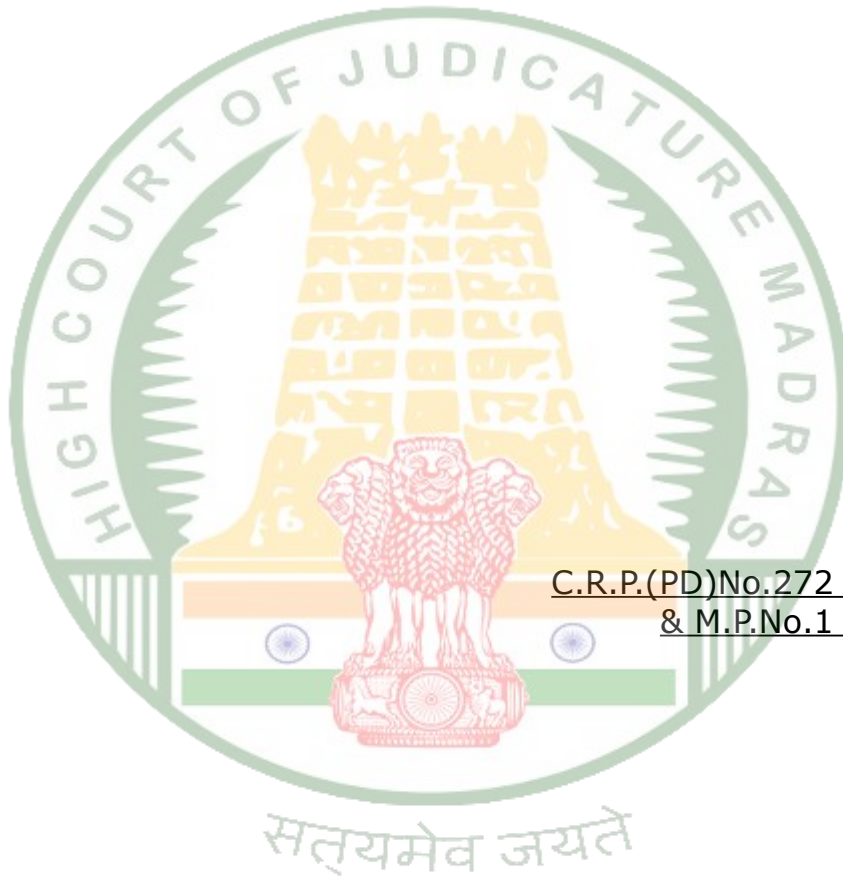
To

The Subordinate Judge,
Nagapattinam.

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V.M.VELUMANI,J.

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