

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.06.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.872 of 2011

1.Seetha @ Seethalakshmiammal

2.Mohana

.. Petitioners

Vs.

1.Selvi

2.Kamala

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order of the Subordinate Judge's Court at Madurantakam, dated 07.01.2011 in I.A.No.454 of 2010 in O.S.No.47 of 2007.

For Petitioners : Mr.P.Valliappan

For Respondents : Mr.M.S.Subramanian (for R1)

No Appearance (for R2)

ORDER

The defendants in O.S.No.47 of 2007 are the civil revision petitioners before this Court, challenging the order passed in I.A.No.454 of 2010 in O.S.No.47 of 2007, dated 07.01.2011, on the file of the Subordinate Court, Madurantakam.

2.The case of the petitioners/defendants is that the respondent/plaintiff has filed the suit in O.S.No.47 of 2007 against the petitioners/defendants for partition and for separate possession of the suit properties.

3.The petitioners/defendants were filed their written statement denying the allegations set out by the respondent/plaintiff and sought for the dismissal of the suit.

4.The said suit was set exparte and the exparte decree was passed on 30.06.2008 against the petitioners/defendants. Therefore, they filed I.A.No.454 of 2010 in O.S.No.47 of 2007 for condoning the delay of 738 days in filing the set aside application under Order 9 Rule 13 of C.P.C.

5.In the affidavit filed in support of the application in I.A.No.454

of 2010, the petitioners/defendants stated that they already engaged a counsel to contest the matter and also states that the respondent/plaintiff is not entitled to any share in the suit properties. The suit properties are not the properties of Sakunthala Ammal, her mother. Though the petitioners/defendants were engaged a counsel to contest the case on merits. But, till June 2008, he has not filed the statement. Therefore, they were set exparte and an exparte decree was passed on 30.06.2008. Since the petitioners/defendants believed his representations and waited for the trial of the case, but, in the year 2010 only they came to know about the final decree notice was issued to the petitioners/defendants. Immediately, the petitioners/defendants were approached and questioned their counsel at Madurantakam but he has handed over the case bundle with consent endorsement in the vakalath, directing the petitioner they have engaged some other counsel for the above suit. Therefore, after engaging the present counsel, he verified and informed the petitioners that an exparte decree was passed against this petitioners/defendants on 30.06.2008. In the said circumstances, they were advised by the present counsel that the petitioners should file the petition to set aside the application under Order 9 Rule 13 CPC. But, as per the above provisions, the set aside application ought to be filed within 30 days from 30.06.2008. But, the petition has been filed with the delay

of 738 days in filing the set aside application. Therefore, they prayed the trial Court to condone the delay of 738 days in filing the set aside application.

6. On receipt of the said notice in the said petition, the respondent/plaintiff was filed her counter, denying allegations set out by the petitioners in the affidavit. Though, the suit was set exparte and an exparte decree was passed on 30.06.2008 and final decree application was filed in I.A.No.45 of 2009 and the Commissioner also visited the property on 27.07.2010. In the final decree application also, these petitioners/defendants were set exparte. When the petitioners/defendants were received the notice in I.A.No.45 of 2009 they must have to approach the Court immediately. But, without doing so they have filed the present petition after two years of the preliminary decree by saying that the counsel has not informed properly in respect of the suit. Therefore, the petition filed by the petitioners/defendants have not given any reason for the huge delay of 738 days in filing the petition. Therefore, the said petition is not maintainable and the respondent/plaintiff prayed for dismissal of the petition.

7. Considering both side cases, the learned Sub-Judge,

Madurantagam, by his order dated 07.01.2011 dismissed the petition filed by the petitioners/defendants in I.A.No.454 of 2010, on the ground that though the exparte decree was passed on 30.06.2008, the final decree application was filed in I.A.No.45 of 2009, but, even the petitioners/defendants have not interest to conduct the case. The learned Judge also states that without giving any reason for each and every day delay, but simply stated the reason that their counsel was not informed properly. Challenging the said order, the petitioners/defendants have filed the present civil revision petition before this Court.

8.I heard Mr.P.Valliappan, learned counsel appearing for the petitioners and Mr.M.S.Subramanian, learned counsel appearing for the 1st respondent. There was no representation on behalf of the 2nd respondent.

9.It is admitted fact that the suit was filed for partition and for separate possession and the said partition suit should be decided only on merits. In several cases, this Court decided the suit like declaration, partition should be decided only on merits. But, in this case, though the suit was posted for trial, the petitioners/defendants have not appeared on several occasions and finally the learned Sub-

Judge, Madurantakam, was pleased to decreed the suit and an exparte order was passed on 30.06.2008. Thereafter, the final decree application also filed and Commissioner also visited the suit schedule of property.

10.It is admitted fact that the petitioners/defendants have not approached this Court immediately after passing the exparte decree on 30.06.2008, but only after 738 days, they have filed the present petition. The petitioners/defendants have given the only reason that their counsel has not informed properly in respect of the case. Hence, except this reason, there was no other reason given by the petitioners, but this Court has gone through the averments made in the petition and stated that this is the suit for partition and the same should be decided only on merits.

11.It is true that the suit was filed in the year 2007 and the same was set exparte on 30.06.2008. Even after receiving the notice on final decree application, the petitioners have not shown their interest to file the application immediately, but after two years, they filed the application for condoning the delay.

12.During the course of arguments, the learned counsel

appearing for the 1st respondent has filed the typed set in which there are three documents are produced by the 1st respondent viz., (1) a Registered Sale Deed, dated 03.02.2010 executed by Mohana/2nd petitioner herein in favour of one Mr.C.Govindasamy, (2) the document dated 22.04.2010, the very same 2nd petitioner Mohana has executed a Registered Power of Attorney in favour of one Mr.Narayanasamy and (3) the document dated 04.05.2010, the Registered Sale Deed executed by the Power of Attorney Mr.Narayanasamy, who is the Power agent of Mohana in favour of one Mr.Govindasamy. The said execution was made by the petitioners after the exparte decree was passed on 30.06.2008 in respect of the suit schedule of property, since the Court below has passed the preliminary decree for partition of the schedule of properties mentioned in the suit which was schedule of property in the above three documents. Therefore, the learned counsel appearing for the 1st respondent argued that after passing the decree on 30.06.2008 without approaching the Court below for setting aside the exparte decree. But, purposely the 2nd petitioner has executed three documents, even after preliminary decree of the trial Court.

13.The learned counsel appearing for the 1st respondent also produced an order of interim injunction passed by the learned District

Munsif Court, Madurantakam in I.A.No.590 of 2013 in O.S.No.129 of 2013, dated 18.07.2013, in which the purchaser Mr.C.Govindasamy, who purchased the property from the said Mohana/the 2nd petitioner herein and Power Agent Mr.Narayanasamy, he approached the Court viz. The District Munsif Court, Madurantakam and filed the suit against the respondents viz. One Selvi and one Jayaraman and obtained an order of interim injunction. Therefore, the petitioners are played fraud on the Court by passing the exparte decree dated 30.06.2008 and sold the property in favour of Mr.C.Govindasamy, which act is totally against the law and total fraud played by the petitioner in the Court. Therefore, the learned counsel appearing for the 1st respondent argued that this civil revision petition filed by the petitioner should be dismissed. The arguments made by the learned counsel appearing for the 1st respondent should have accept since the petitioners particularly the 2nd petitioner Mohana, who is the party, the 2nd defendant in the suit filed by this respondent, knowing fully well the said exparte on 30.06.2008. But, purposely in the year 2010, she sold the property in favour of Mr.Govindasamy. Therefore, it will clearly proved that even the plaintiffs in this case, whether entitled or not entitled of the partition of the property. Once, the Court below has passed decree against these petitioners, the 2nd petitioner have no *locus standi* or no right to sold the property to any

third party. But suppressing the material fact, the sale deed was executed by the 2nd petitioner Mohana and her Power Agent is Mr.Narayanasamy in favour of the Govindasamy.

14.Admittedly, they approached the Court viz. the District Munsif Court, Madurantakam and obtained the order of interim injunction, but that was not brought to the notice of the learned Sub-Judge, Madurantakam in the present suit in O.S.No.47 of 2007, therefore, except, who curtailed the illegal act of the petitioner. This Court have right to pass order to kept the Registered Sale deed documents dated 03.02.2010, 22.04.2010 and 04.05.2010 should not be acted upon, since the balance of convenience is also in favour of the petitioner to putforth his case.

15.During the course of arguments, the learned counsel appearing for the petitioners has produced three judgments passed by this Court and the Hon'ble Apex Court, in the case of

(1)**N.Balakrishnan v. M.Krishnamurthy** reported in **AIR 1998 Supreme Court 3222**, the Hon'ble Supreme Court has held as follows:

“Limitation Act (36 of 1963), S.5 – Condonation of delay – Sufficient cause – Application by appellant for

setting aside ex parte decree – Delay of 883 days in filing of – Said delay caused due to failure of advocate to inform appellant as well as his failure to take action – Found to be satisfactory by trial Court – Order of High Court in revision setting aside same – Not proper – Court should compensate opposite party in such cases – Moreso in the case since appellant had secured compensation from delinquent advocate.”

(2)*Raman Tech. & Process Engg. Co. & another v. Solanki*

Traders reported in **2008-3-L.W. 744**, it is held as follows:

“A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him – Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment.”

(3)*Nagarathinammal and others v. Madhammal* reported in

2014 (2) CTC 649, it is held as follows:

“Limitation Act, 1963 (36 of 1963), Section 5 – Delay of '903' days in seeking to set aside ex parte Preliminary Decree for Partition – Application to condone delay dismissed by Trial Court and Order challenged in Revision – Reasons given in Affidavit are not substantiated

and insufficient to condone delay – Averment that Defendant's Counsel was suspended by Bar Council of Tamil Nadu and they had to engage different Counsel for filing Application to set aside ex parte Decree, accepted – Defendants are entitled to one more opportunity to contest case – Delay condoned on payment of costs of Rs.10,000/- - Civil Revision Petition allowed.

Facts: Defendants in a Suit for Partition, suffered an ex parte Decree. They sought to condone the delay of '903' days in seeking to set aside the ex parte Decree. Trial Court dismissed the said Application. On Revision, High Court condoned the delay on payment of Costs of Rs.10,000/-.

Held: Though the supporting Affidavit filed before the Court below did not contain an averment to the effect that the Counsel engaged by the Revision Petitioners in the Suit was suspended by the Bar Council of Tamil Nadu and the ex parte Preliminary Decree came to be passed during the period of his suspension, they wanted to raise it as an additional ground in the present Revision. Considering the nature of the plea sought to be raised, this Court has permitted the Petitioners to issue by the Bar

Council of Tamil Nadu to the said Advocate and also a copy of the order imposing punishment and also a direction to pay some amount to the Plaintiff, with a rider that in the event of failure to pay the same, the suspension period will be prolonged for a further period of one year. The suspension period was stated to be three years and prolonged suspension on default, was to be four years. Under the said circumstances, the Petitioners have stated that they had to engage a different Counsel and file the necessary Application to set aside the ex parte Preliminary Decree and the Application to condone the delay.”

16. This Court and the Hon'ble Apex Court very clearly held that it must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. While condoning the delay the Court should not forget the opposite party altogether. It

must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss.

17. Apart from this, the Hon'ble Apex Court in a recent Judgment in Civil Appeal No.(S).3777 of 2015 it is held that in a case there was a delay of 882 days delay in preferring an appeal suit and the said petition was dismissed by this Court by order dated 05.06.2013 in CRP(NPD)No.266 of 2011 and an appeal was filed before the Hon'ble Apex Court in Civil Appeal No.(S).3777 of 2015 in which the Hon'ble Apex Court has passed an order as follows:

“Leave granted.

This appeal arises out of an order dated 5th June, 2013, passed by the High Court of Judicature at Madras whereby CRP(NPD)No.266 of 2011 filed by the appellant has been dismissed and the order passed by the first appellate court declining condonation of 882 days in the filing of the appeal by the appellant affirmed.

We have heard learned counsel for the parties at some length. We are satisfied that in the facts and circumstances of the case, the first appellate court could and indeed ought to have condoned the delay in the filing of the appeal. Since,

however, the delay is fairly inordinate, we are inclined to direct condonation subject to payment of costs.

We accordingly allow this appeal, set aside the orders passed by the High Court and that passed by the first appellate Court with the direction that upon deposit of a sum of Rs.50,000/- (Rupees fifty thousand) towards costs before the first appellate court within six weeks from today, the delay in the filing of the appeal shall stand condoned. The first appellate court shall hear and dispose of the first appeal filed by the appellant expeditiously and as far as possible within a period of six months from the date the costs are deposited by the appellant. The amount of costs shall be paid to the respondent.

The appeal is allowed in the terms and to the extent indicated above."

18.The Hon'ble Apex Court has allowed the Civil Appeal No.(S).3777 of 2015 on condition that the appellant shall pay a sum of Rs.50,000/- as cost to the respondent in the said appeal. But, in the present case on hand, the huge delay of 778 days, the reason given by the petitioner is that his previous counsel has not informed them properly about the suit status and therefore, they have no knowledge about the exparte decree dated 30.06.2008.

19.In the above circumstances, in the interest of justice, to give

one more opportunity to the defendants to put forth their case by applying the above judgments, I am inclined to allow this civil revision petition by setting aside the order passed in I.A.No.454 of 2010 in O.S.No.47 of 2007, dated 07.01.2011, but the petitioner should compensate the same to the respondents/defendants by way of cost.

20.In the result:

(a) this civil revision petition is allowed by setting aside the order in I.A.No.454 of 2010 in O.S.No.47 of 2007, dated 07.01.2011, on the file of the Subordinate Court, Madurantakam, on condition that the petitioner should pay a sum of Rs.35,000/- as cost to the learned counsel for the 1st respondent / plaintiff within a period of four weeks from the date of receipt of a copy of this order;

(b) on production of the payment of receipt within the time stipulated by this Court, the trial Court namely the Subordinate Court, Madurantakam, is hereby directed to number the set aside application and to dispose of the same within a period of four weeks thereafter, after giving notice to either parties;

(c) on passing orders in the set aside application, the

trial Court is directed to take up the suit on day to day basis, without giving any adjournment to either parties and to dispose of the same on merits within a period of three months. Both the parties are hereby directed to give their fullest cooperation for early disposal of the suit.

(d)till the disposal of the suit in O.S.No.47 of 2007, the document in Document No.313 of 2010 executed by the 2nd petitioner in favour of Mr.Govindasamy on 03.02.2010; the general power of attorney in Document No.114 of 2010 executed by the 2nd petitioner in favour of one Mr.Narayanasamy on 22.04.2010 and the Document No.1663 of 2010 sale deed executed by the power agent the 2nd petitioner in favour of Mr.Govindasamy on 04.05.2010, all are shall be kept in abeyance.

01.06.2017

Note:Issue order copy on 15.06.2017

Index:Yes
Speaking Order

vs

To

The Subordinate Court,
Madurantakam.

M.V.MURALIDARAN, J.

VS

Pre-Delivery order made in
CRP(NPD)No.872 of 2011

01.06.2017

<http://www.judis.nic.in>