

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1945 of 2010
& M.P.No.1 of 2010

1. Krishnamoorthy (Deceased)
2. Jothi
3. Rangaraj
4. Vasuki

.. Petitioners

4th petitioner brought on record as
legal heir of the deceased 1st petitioner
Vide Order of Court dated 06.11.2013,
made in M.P.Nos.1 to 3 of 2013 in
C.R.P.No.1945 of 2010.

Vs.

V.Bharani

.. Respondent

PRAYER: Civil Revision Petition filed Under Article 227 of the
Constitution of India, against the fair and decretal order dated
25.03.2010 made in I.A.No.442 of 2009 in O.S.No.27 of 2006, on
the file of the Principal Sub Judge, Pondicherry.

For Petitioners

: Mr.T.S.Baskaran

For Respondent

: Mr.T.Dhanasekaran

ORDER

This Civil Revision Petition is filed against the fair and decretal order dated 25.03.2010 made in I.A.No.442 of 2009 in O.S.No.27 of 2006, on the file of the Principal Sub Judge, Pondicherry.

2. The petitioners are defendants and respondent is the plaintiff in O.S.No.27 of 2006, on the file of the Principal Sub Judge, Pondicherry. Respondent filed the suit for a direction to the petitioners to execute the sale deed in favour of the respondent in respect of the suit "B" Schedule property by considering the advance amount of Rs.5,71,000/- as sale consideration, within the time fixed by this Court and to confirm the respondent's possession of the "B" Schedule property in pursuance of the sale deed executed by the petitioners or Court in respect of 'B' Schedule Property. The petitioners filed an application for amendment of the plaint and the same was ordered. The respondent did not carry out the amendment on time. The suit was adjourned for number of occasions for carrying out the amendment. On 25.03.2009, the suit was dismissed for default, for not carrying out the amendment. The respondent filed I.A.No.442 of 2009 for restoration of the suit.

3. According to the respondent, on 25.03.2009, the counsel appearing for the respondent was suffering from severe blood pressure and respondent's Power Agent represented in the morning and when the suit was passed over, he also felt ill and he could not be present in the afternoon to represent the suit. In view of the absence of the respondent or her Power Agent and her counsel, the suit was dismissed. The absence of the respondent or Power Agent is neither wilful nor wanton.

4. The petitioners filed counter affidavit and opposed the said application and submitted that the suit was dismissed for default on 25.03.2009, while I.A.No.442 of 2009 was filed for restoration only on 9th July, 2009. Respondent has not even filed any application for condonation of delay. The respondent is dragging on the proceeding at every stage, after amendment being ordered. The respondent in spite of number of opportunities being given, has not carried out the amendment. Hence the suit was dismissed for default. The reason given by the respondent is not valid.

5. The learned Judge, considering the nature of the relief sought for in the suit and considering the pendency of two more

suits between the parties, in order to give opportunity to the petitioners, allowed the application.

6. Against the said order dated 25.03.2010 made in I.A.No.442 of 2009 in O.S.No.27 of 2006, the present civil revision petition is filed by the petitioners.

7. The learned counsel appearing for the petitioner submitted that the respondent did not file any application for condonation of delay and learned Judge had failed to consider the objection raised by the petitioner and also the fact that the respondent's intention is only to drag on the proceedings, relied on the judgment reported in **(2009) 6 SCC 194 (Sneh Gupta Vs. Devi Sarup and Others):**

"70. Even otherwise, we do not think that any error has been committed by the High Court in arriving at the finding that the appellant had knowledge of the passing of the compromise decree much earlier. She did not file any application for condonation of delay. She filed two more applications for recall of the order dated 06.11.2004 in other enacted appeals. Those applications were also filed after expiry of the period of limitation and none of those applications were also accompanied with an application for condonation of

delay. In absence of any application for condonation of delay, the Court had no jurisdiction in terms of Section 3 of the Limitation Act, 1963, to entertain the application for setting aside the decree (See Dipak Chandra Ruhidas V. Chandan Kumar Sarkar and Sayeda Akhtar V. Abdul Ahad)."

8. The learned counsel appearing for the respondent submitted that the respondent filed an application for restoration of the suit dated 24.04.2009 on 27.04.2009. But Court neither numbered the petition nor returned the said application. Then only, the petitioner filed the present application. The learned counsel appearing for the respondent referred to the certified copy of the affidavit filed in additional typed set of papers and submitted that the respondent has given valid reason for filing an application to restore the suit. The learned Judge has considered the application on merits and being satisfied by the respondent, accepted the said reason and allowed the application. The Court should not on hyper technicality dismiss the application for restoration of the suit. The Learned counsel for the respondent relied on the judgment reported in **AIR 2010 SC 2991 (Bhagmal & Others V. Kunwar Lal &**

Others):

7. ".....Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was proved in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient."

The learned counsel further submitted that the judgment relied on by the learned counsel appearing for the petitioners reported in **2009 (6) SCC 194 (Sneh Gupta V. Devi Sarup & others)** was considered by the Hon'ble Apex Court and allowed the application to

set aside the exparte decree. The reasoning in the judgment reported in **AIR 2010 SC 2991 (Bhagmal & Others V. Kunwar Lal & Others)** is applicable to the facts of the present case and further submitted that in order to give an opportunity to respondent to contest the suit on merits, the impugned order may be confirmed on payment of cost to the petitioner.

9. Heard the learned counsel appearing for the petitioners and respondent and perused the materials available on record.

10. From the materials on record, it is seen that the respondent is represented by her Power agent. The affidavit filed in support of application to restore the suit was sworn by the power agent filed in support of application filed to restore the suit. According to the power agent of respondent, he was present in the Court on 25.03.2009 and suit was passed over. After that he also fell ill and could not attend the proceedings in the afternoon. This clearly shows that power agent of respondent was aware of dismissal of suit. In spite of the said knowledge, no application was filed within 30 days of the date of dismissal. Even though the affidavit is dated 24.04.2009, it was filed only on 27.04.2009. The

respondent did not file any application to condone the delay as application to restore the suit was filed only on 27.04.2009, beyond the period of limitation. In the circumstances, the contention of the learned counsel for the petitioners that the learned Judge has committed an irregularity in allowing the application and restored the suit without there being any application to condone the delay has considerable force and the judgment of Hon'ble Apex Court is squarely applicable to the contention of the learned counsel for the petitioner. The judgment relied on by the learned counsel for the respondent is not applicable to the facts of the present case. In the said case, the defendant filed application to set aside the exparte decree within 30 days from the date of knowledge. In such circumstances, the Hon'ble Apex Court rejected the contention of the plaintiff that an application to set aside the exparte decree without an application for condonation of delay is not maintainable. In the present case, the respondent was aware of the dismissal of the suit for default on the date when such order was passed. Admittedly, the application to restore the suit was filed after 30 days without application to condone the delay. The application, as rightly contended by the learned counsel for the petitioners is not maintainable and the learned Judge ought not to have entertained

and passed order on merits. In view of the above facts, the order of the learned Judge is liable to be set aside and hereby set aside. I.A.No.442 of 2009 in O.S.No.27 of 2006, filed by respondent is dismissed.

11. In the result, the civil revision petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

21.08.2017

Index: Yes/No

gsa

To

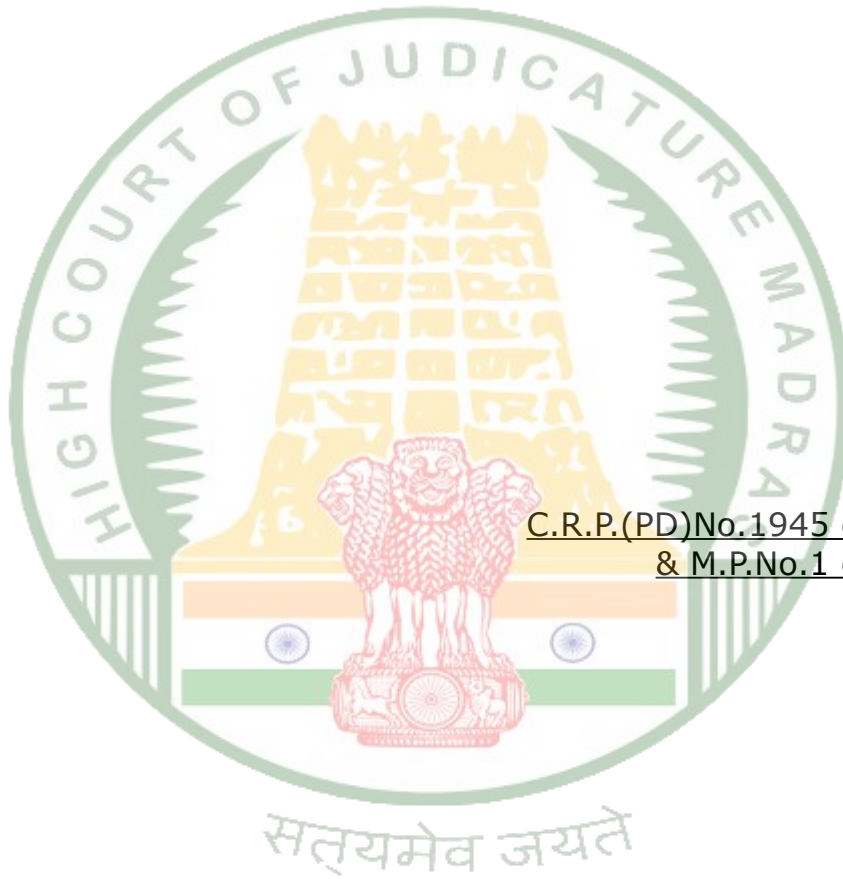
The Principal Subordinate Judge,

Pondicherry.

WEB COPY

V.M.VELUMANI, J.

gsa



C.R.P.(PD)No.1945 of 2010
& M.P.No.1 of 2010

WEB COPY

21.08.2017