

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD) No.2229 of 2009
& M.P.No.1 of 2009

Thimma Nayakkar (died)

1. T.Radhamani
2. T.Murugasamy
3. T.Nirmala

(Cause Title accepted, vide order dated 28.07.2009
in M.P.No.1 of 2009)

.. Petitioners

Vs.

P.T.Nagarajan

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and final order passed in I.A.No.30 of 2007 in O.S.No.45 of 2005 dated 24.03.2008, on the file of the I Additional Subordinate Judge, Gobichettypalayam.

For Petitioner : Mr.P.Thangavel

For Respondent : Mr.B.Kumarasamy

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ORDER

This Civil Revision Petition has been filed against the fair and final order passed in I.A.No.30 of 2007 in O.S.No.45 of 2005, dated 24.03.2008, on the file of the I Additional Subordinate Judge, Gobichettypalayam.

2. The petitioners are the legal heirs of one Thimma Nayakkar the defendant in O.S.No.45 of 2005. The respondent is the plaintiff, who filed the suit in O.S.No.45 of 2005 on the file of the I Additional Subordinate Judge, Gobichettypalayam for specific performance for agreement of sale dated 11.02.2011 against the deceased Thimma Nayakkar. In the suit, the said defendant / Thimma Nayakkar did not file written statement and he was set ex-parte and ex-parte decree was passed on 07.03.2006. The defendant filed I.A.No.30 of 2007 to condone the delay of 242 days in filing application to set aside the ex-parte decree.

3. According to the deceased defendant, he was suffering from Malaria fever and therefore, he could not file the written statement in time. He filed the application to set aside the ex-parte decree with condone delay petition on 06.11.2006, and the same was returned by the Court. Neither the defendant nor his clerk/counsel took the returned papers. In the circumstances, the defendant filed I.A.No.30 of 2007 to condone the delay of 242 days in filing an application to set aside the ex-parte decree. The respondent filed counter affidavit and opposed the said application.

4. Before the learned Judge, the deceased defendant Thimma Nayakkar was examined as DW1 and he did not mark any document. There is no oral or documentary evidence on behalf of the respondent.

5. The learned Judge, considering the averments made in the affidavit, counter affidavit and the evidence of the defendant, dismissed the application on the ground that the defendant has not produced any material to show that he was suffering from Malaria fever and also held that through the same advocate, he appeared before the District Munsif, Sathyamangalam in O.S.No.373 of 2004 and O.S.No.51 of 2004.

6. Before filing the Civil Revision Petition, the defendant died. The petitioners who are the legal heirs of the deceased defendant, have filed the present Civil Revision Petition challenging the order dated 24.03.2008 passed in I.A.No.30 of 2007 in O.S.No.45 of 2005.

7. The learned counsel appearing for the petitioners has submitted that this Court as well as the Hon'ble Apex Court have held that the application for condoning the delay must be considered liberally. The learned Judge failed to consider the reason given by the defendant and

further submitted that the petitioners must be given an opportunity to contest the case on merits.

8. The learned counsel appearing for the respondent has submitted that the defendant is in the habit of remaining ex-parte and then filing petition to set aside the ex-parte order / decree and the defendant has not proved that he has filed the application to condone the delay on 06.11.2006 and he has not filed any copy of the said application before the learned Judge. In the Execution Petition in E.P.R.No.227 of 2006, the respondent has deposited non-judicial stamp papers for execution of the sale deed. The defendant filed application only after receiving notice in the Execution Petition. Subsequently, the legal heirs have filed this Civil Revision Petition and hence, he prayed for the dismissal of Civil Revision Petition.

9. Heard both sides and perused the materials available on record.

10. The defendant has filed application to condone the delay of 242 days in filing an application to set aside the ex-parte decree. According to the defendant, he was suffering from Malaria fever and he could not file written statement in time and therefore, he filed a petition to set aside the ex-parte decree on 06.11.2006 and when the same was returned by the Court, somebody has taken the returned papers and he filed the present

petition with delay of 242 days in filing the petition to set aside the ex-parte decree. The defendant failed to prove his contention by any acceptable evidence, and except oral evidence, he has not produced any document to show that he has taken treatment for Malaria fever. Further, on earlier occasion, the defendant was set ex-parte, and the said ex-parte order was set aside on the ground that due to illness, he could not conduct the case. For the second time, he was set ex-parte and sought for condone delay on the same ground. The defendant has admitted in his evidence that he was appearing in two other cases during that time and appeared through the same advocate and also admitted that he was set ex-parte in another suit. It is no doubt true that it is well settled that application for condonation of delay must be considered liberally and the length of delay is not a criteria. At the same time it is well settled that the intention of the party must be bona-fide and it should not malafide. The party must give valid and acceptable reason for condonation of delay. The intention of the party should not be to drag on the proceedings. From the materials on record, it is seen that the intention of the party is to drag on the proceedings.

11. The learned Judge, considering all the above facts and considering the materials available on record, dismissed the application by giving cogent

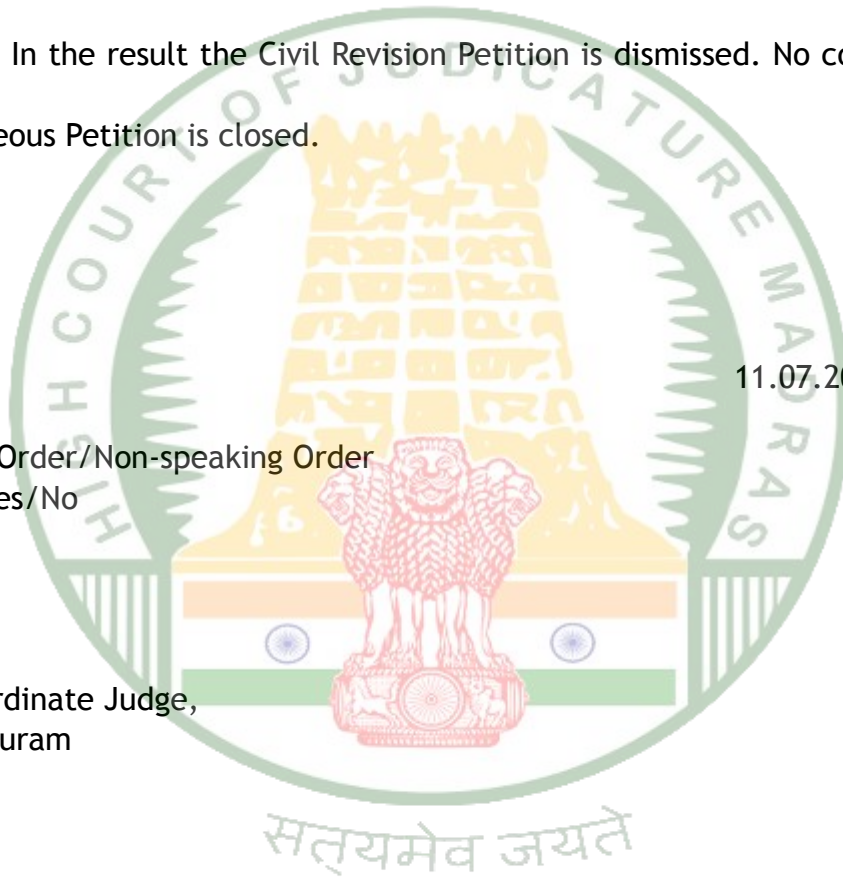
and valid reasons. In these circumstances, there is no illegality or irregularity warranting interference by this Court in the order of the learned trial Judge, dated 24.03.2008.

12. In the result the Civil Revision Petition is dismissed. No costs. The Miscellaneous Petition is closed.

11.07.2017

Speaking Order/Non-speaking Order
Index :Yes/No
pvs

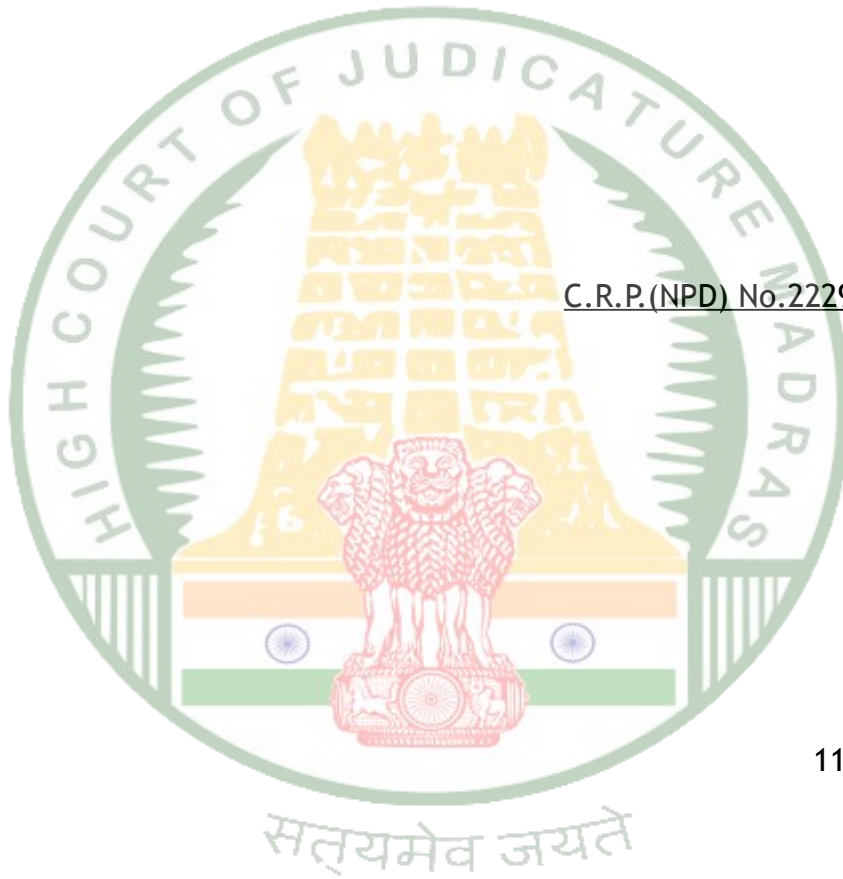
To
The Subordinate Judge,
Kancheepuram



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V.M.VELUMANI, J.

pvs



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