

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.3035 of 2012

1. Sagayameri
2. Simon
3. Mary Josephine
4. Ashirwadh

.. Petitioners

Vs.

1. M.Subramani (Deceased)
2. Francies
3. Arullappan
4. Gajammal
5. S.Sujatha
6. S.Shanthi
7. S.Prameela
8. S.Gunasekaran

.. Respondents

RR4 to 8 brought on records as
LRs of deceased 1st respondent
vide order of Court dated 25.01.2017,
by MVMJ, made in C.M.P.No.5757/2016
in C.R.P.No.3035 of 2012.

PRAYER: Civil Revision Petition filed under Section 115 of C.P.C.,
against the fair and decretal order dated 05.07.2012 made in
I.A.No.133 of 2011 in A.S.Nil/2011 on the file of the Subordinate
Judge, Vellore.

For Petitioners	: Mr.R.Margabandhu
For R1	: Died
For R2	: No appearance
For R3	: Notice not ready
For R4 to R8	: M/s.G.Jeremiah

ORDER

This civil revision petition has been filed against the fair and decretal order dated 05.07.2012 made in I.A.No.133 of 2011 in A.S.Nil/2011 on the file of the Subordinate Judge, Vellore.

2. The petitioners are plaintiffs, respondents 1 to 3 are the defendants 3, 1 and 2 respectively in O.S.No.19 of 2006. The petitioners filed suit for partition, stating that they have 2/3rd share along with the 3rd respondent in the suit property and for appointment of an Advocate Commissioner to inspect the properties; measure and value the same, file a report indicating the mode of division. According to the petitioners, the respondents 2 and 3 sold the property to the 1st respondent, without obtaining permission from the Court, including the share of the petitioners. The 1st respondent entered appearance on 15.02.2010, but he did not file written statement. He was set exparte on 14.09.2010. The respondents 2 and 3 contested the suit and preliminary decree was passed on merits on 25.10.2010. The 1st petitioner filed I.A.No.24 of

2011 for passing of final decree. The 1st respondent entered appearance through his counsel on 31.03.2011. Since the 1st respondent has not filed any counter affidavit, he was set exparte in I.A.No.24 of 2011 on 13.07.2011. Thereafter, he filed I.A.No.575 of 2011 to set aside the exparte order passed on 13.07.2011. The 1st respondent also filed first appeal, along with I.A.No.133 of 2011, under Section 5 of the Limitation Act, in A.S.No.Nil/2011 on 01.08.2011 for condoning the delay of 250 days in filing the first appeal.

3. According to the 1st respondent, his counsel did not inform him about the stage of the case and in view of the same, he could not appear before the Court. When the notice in final decree proceedings was served on 1st respondent, he engaged an Advocate. The Advocate entered appearance on behalf of the 1st respondent and got the signature in the counter affidavit to be filed in I.A.No.24 of 2011 for final decree, but, did not file the same. The 1st respondent was set exparte. According to the 1st respondent, his counsel handed over the bundle to other counsel and kept quiet. The Office Assistant of the Village Administrative Office on 13.07.2011, informed the 1st respondent about the visit of Advocate Commissioner on 07.08.2011 to divide the properties. On coming to

know about the exparte decree, immediately, he filed appeal along with I.A.No.133 of 2011 to condone the delay in filing the application. The delay is neither wilful nor wanton.

4. The petitioners filed counter affidavit and opposed the said application and submitted that the 1st respondent entered appearance on 15.02.2010. After several adjournments, when the case was posted on 14.09.2010, there was no representation on behalf of the 1st respondent and exparte decree was passed on 25.10.2010. The 1st respondent even after service of notice in I.A.No.24 of 2011 for final decree, has not taken any steps to file the appeal immediately. The 1st respondent has not given any valid reason for condoning the delay of 250 days in filing the appeal. Only when party gives valid reason for condoning the delay, the application under Section 5 can be allowed. The respondents appeared in final decree proceedings and in spite of knowing the suit proceedings, they did not file appeal. It is for the respondents to pursue the suit proceedings and they should not blame their Advocate.

5. The learned Judge, considering the fact that the 1st respondent (now deceased) filed written statement and did not

contact to give instructions to his counsel to cross examine petitioners' witnesses on the ground that his Advocate did not inform him about the commencement of trial, held that it is the duty of the Advocate to inform the party, about the cross examination of witnesses and accepted the reason given by the deceased first respondent to condone the delay in filing the appeal, in order to give an opportunity to the first respondent. The learned Judge allowed the application on condition that the first respondent pays a sum of Rs.1000/- to the petitioners 1 to 4.

6. Against that order dated 05.07.2012, made in I.A.No.133 of 2011 in A.S.No.Nil/2011, the present civil revision petition is filed by the petitioners.

7. The learned counsel appearing for the petitioners submitted that the first respondent did not give any reason for condoning the delay. He is blaming his Advocate for his non appearance, which is not a valid reason. The learned counsel appearing for the petitioner relied on the judgments viz., "**(2006) 2 LW 99 (Mannariah &**

Sons and others Vs. M.M.Sankaranarayanan), (2006) 4 LW 650 (M.Ramakrishnan Vs. Vinod Kumar Goyal), (2010) 6

CTC 10 (S.Ramakrishnan & Others Vs. S.Rajeswari), (2010) 4 LW 180 (Murugan and another Vs. K.Elumalai and another)”

and contended that respondents have not given valid reason for condoning delay. The learned Judge erred in allowing the application.

8. The learned counsel appearing for the respondents 4 to 8 submitted that the first respondent (now deceased) had given valid reason for condoning delay. The party should not be penalised for the mistake of his Advocate.

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

10. From the materials on record, it is seen that the petitioners and 3rd respondent are the children of 2nd respondent. The petitioners filed suit against their father and brothers and 1st respondent, who is the purchaser from their father and brothers.

The 1st respondent has filed written statement and was contesting the suit. According to the 1st respondent, his Advocate did not inform him about the stage of the suit and therefore, he could not

give instructions to cross examine the petitioners' witnesses. Even though he ought to have pursued the matter with his Advocate and ought to have taken active part in the suit proceedings, in order to give an opportunity to the 1st respondent to put forth his case on merits in appeal, the learned Judge allowed the application to condone the delay. The 1st respondent has given acceptable reason for condonation of delay.

11. It is well settled law that application for condoning the delay must be considered liberally and length of delay is not a criteria. The Courts must see whether the parties give acceptable and valid reason and the intention of the parties must be bonafide and not *malafide*. The parties should not be shut down at the threshold itself and they must be given an opportunity to put forth their case on merits. The 1st respondent has given acceptable reason for condonation of delay.

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V.M.VELUMANI, J.

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12. In view of the well settled principle, there is no irregularity or illegality in the order passed by the learned trial Judge warranting interference by this Court.

13. In the result, the civil revision petition is dismissed. However, there is no order as to costs.

26.07.2017

Index: Yes/No

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To

The Subordinate Judge, Vellore.

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