

**IN THE HIGH COURT OF JUDICATE AT MADRAS**

**Dated: 21.02.2017**

**CORAM**

**THE HON'BLE MR.JUSTICE M.V.MURALIDARAN**

**CRP(NPD)No.3774 of 2012**

**and**

**M.P.No.1 of 2012**

1.Thangamuthu

2.Pappathi

3.T.Devi

... Petitioners

**Vs**

Saraswathi

... Respondent

**Prayer:** Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decretal order dated 19.07.2012 made in I.A.No.1062 of 2011 in O.S.No.45 of 2009, on the file of the Principal Sub Court, Erode.

Petitioners

: Mr.N.Manokaran

Respondents

: Mr.V.S.Kesavan

**ORDER**

The defendants 1 to 3 in O.S.No.45 of 2009 are the Civil Revision Petitioners before this Court, challenging the order in I.A.No.1062 of 2011 in O.S.No.45 of 2009, dated 19.07.2012, on the file of the learned Principal Sub Court, Erode.

2.The case of the petitioners/defendants 1 to 3 is that the suit has been filed by the respondent/plaintiff against the defendants along with one another defendant for partition of the suit schedule of property in O.S.No.45 of 2009 before the learned Principal Sub Court, Erode.

3.The written statement was filed by the 4<sup>th</sup> defendant denying the averments made in the plaint but no written statement was filed by the defendants 1 to 3.

4.On 10.08.2010 due to non appearance of the defendants and non filing of the written statement by the defendants 1 to 3, an exparte preliminary decree was passed against the petitioners/defendants along with the 4<sup>th</sup> defendant, who is the purchaser of the property.

5.Challenging the above exparte preliminary decree, the petitioners, who are the defendants 1 to 3 were filed a set aside application along with the condonation of delay of 773 days in filing the set aside application in I.A.No.1062 of 2011, in fact, the petitioners/defendants 1 to 3, who are not filing the petition, originally they were filed written statement along with I.A.No.1062 of 2011.

6.It is the case of the petitioners/defendants 1 to 3 in the condonation of delay that on 09.07.2009 originally the suit in O.S.No.45 of 2009 posted for filing the written statement. In this case, the 1<sup>st</sup> defendant is the husband and the 2<sup>nd</sup> defendant is the wife and the 3<sup>rd</sup> defendant is a daughter of the defendants 1 and 2.

7.Being the male member, the 1<sup>st</sup> defendant has taking care of the case and filed the affidavit by stating that the 1<sup>st</sup> petitioner's wife, who is the 2<sup>nd</sup> petitioner was not well, due to Jaundice from 05.07.2010 and also the 1<sup>st</sup> defendant suffering from Chikkenkuniya and both of them were suffering their illness. The petitioners 1 and 2 were taking treatment and bedridden. Therefore, they are unable to approach their counsel and hence they were set exparte on

09.07.2009.

8.Both the petitioners are the defendants 1 and 2, are unable to attend the Court and approach their counsel for the reason stated above that they were not appeared in the Court. Therefore, there is a delay of 773 days in filing the petition to set aside the preliminary exparte decree.

9.A counter affidavit has been filed by the respondent in which the respondent has denied the averments made in the plaint.

10.The averments of the 2<sup>nd</sup> petitioner who suffered for Jaundice and the 1<sup>st</sup> petitioner who suffered from Chikkenkuniya and they are unable to come out of home and approaching their Advocate for giving statement. After a long period of delay of 773 days, the petitioners had filed a petition to set aside exparte decree, for each and every day delay, the petitioners shall give reason for the each day delay. Therefore, the exparte decree passed by the Court below is correct and the respondent/plaintiff prayed for dismissal of the said application.

11.Considering both side cases, the learned Principal Subordinate Judge, Erode by order dated 19.07.2012 dismissing the application on the ground that the 4<sup>th</sup> defendant was appeared and though the defendants 1 to 3 were not appeared before this Court, but on hearing the 4<sup>th</sup> defendant, the preliminary decree was passed. Therefore, the reason given by the petitioners/defendants 1 to 3 for their non appearance is not correct and apart from this, the respondent/plaintiff who has filed I.A.No.1062 of 2011, in which the petitioners were appeared on 05.07.2012. Therefore, purposely the petitioners were not appeared only with an intention to drag the proceedings and hence the learned Principal Subordinate Judge, Erode, has dismissed the petition. Challenging the said order, the present Civil Revision Petition has been filed.

12.I heard Mr.N.Manokaran, learned counsel appearing for the petitioners and Mr.V.S.Kesavan, learned counsel appearing for the respondent and perused the entire records.

13.The present suit in O.S.No.45 of 2009 was filed against the defendants 1 to 3 along with the 4<sup>th</sup> defendant who is the purchaser for partition of the suit property.

14.Time and again, this Court has categorically held in various cases, in fact myself has passed the order stating that the suit like partition and declaration should be disposed only on merits.

15.The petitioners/defendants 1 to 3 were enclosed the preliminary decree in O.S.No.45 of 2009 dated 10.08.2010 in page No.13 of the typed set of papers, it is clearly stated that the defendants 1 to 3 were not appeared whereas on behalf of the 4<sup>th</sup> defendant Mr.R.Thirumalai, Advocate appeared and heard both side arguments, the preliminary decree has been passed. The preliminary portion of the judgment in O.S.No.45 of 2009, dated 10.08.2010 as follows:

“இந்த வழக்கு 4.8.10ம் தேதி என் முன்பாக இறுதி விசாரனைக்கு வந்த போது வாதி தரப்பில் வழக்கறிஞர் திரு.பி.மாணிக்கம் அவர்கள் ஆஜராகியும், 4ம் பிரதிவாதி தரப்பில் வழக்கறிஞர் திரு.ஆர்.திருமலை அவர்கள் ஆஜராகியும், 1 முதல் 3 பிரதிவாதிகள் அழைத்தும் வருகையின்மையால் அவர்கள் ஒருதரப்பு நிலைக்குட்படுத்தப்பட்டும் இருதரப்பு வாதவுரை கேட்கப்பட்டும் வழக்குரை, ஏதிர் வழக்குரை, மற்றும் சாட்சிய சான்றாவணங்களைப் பரிசீலனை செய்தும் இதுநாள் வரையில் இந்நீதிமன்ற விசாரனையிலிருந்து வந்த இந்த வழக்கில் இன்று இந்நீதிமன்றம் வழங்கும்:”

16. When the Court itself clearly narrated that the petitioners/defendants 1 to 3 in O.S.No.45 of 2009 has not appeared and not filed the written statement, how the learned Principal Sub Judge, Erode, by his order dated 19.07.2011 stated that the defendants 1 to 3 were appeared along with the 4<sup>th</sup> defendant has appeared and argued. Therefore, the non appearance of the defendants would not necessary in the case, is totally against the law and the interest of justice. In fact, the suit was filed against the defendants who are the main parties in the suit and the 4<sup>th</sup> defendant who is the purchaser of the land from the defendants 1 to 3 that means the Court should not say that on hearing the purchaser who is no way connected with the property in respect of partition, how the Court has stated that it is not necessary the appearance of the defendants 1 to 3 in the suit and dismissed the petition. While dealing the condonation of delay, the Court must have looked into and apply its mind in a proper manner and pass appropriate orders.

17. Admittedly, the case in hand is a suit for partition and the petitioners/defendants 1 to 3, who are the main parties in the suit were not appeared before this Court and not even filed the written statement either to deny the averment made in the plaint that too in

the partition suit cannot be show that it is not necessary for the appearance of the petitioners/defendants 1 to 3.

18.The suit is admittedly filed by the respondent/plaintiff against the defendants 1 to 3, who are the main parties for partition and it should be dealt with only on merits by giving fair opportunity to both the parties and the purchaser, who is no way connected with the suit property in respect of claiming partition between the plaintiff and the defendants 1 to 3, the Court cannot simply ignore the laws and the judgment laid down by this Court and the Hon'ble Apex Court and passed exparte decree.

19.Apart from this, the learned counsel for the petitioner also states that the judgment passed by the Hon'ble Supreme Court in Civil Appeal No.(S).3777 of 2015 it is held that there was a delay of 882 days in preferring an appeal suit against the Judgment which was passed by this Court by order dated 05.06.2013 in CRP(NPD)No.266 of 2011 and the Hon'ble Apex Court in the said Civil Appeal No.(S).3777 of 2015, the Hon'ble Apex Court has passed an order as follows:

“Leave granted.

This appeal arises out of an order dated 5<sup>th</sup> 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."

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. Hence, the said judgment is squarely applicable in the present case. Therefore, this Court

warranting interference in the order passed in I.A.No.1062 of 2011 in O.S.No.45 of 2009, dated 19.07.2012, on the file of the learned Principal Sub-Court, Erode, is liable to be set aside, but the petitioners/defendants 1 to 3 who compensate the respondent/plaintiff.

20.In the result:

(a) this Civil Revision Petition is allowed by setting aside the order in I.A.No.1062 of 2011 in O.S.No.45 of 2009, dated 19.07.2012, on the file of the learned Principal Sub-Court, Erode, on condition that the petitioners should pay a sum of Rs.25,000/- as cost to the respondent within a period of four weeks from the date of receipt of a copy of this order;

(b) the trial Court is directed to number the set aside application and pass orders within a period of one month, by giving fair opportunity to both the parties;

(c) on passing the order in set aside application, the trial Court is directed to dispose the suit within a period of two months thereafter, without giving any adjournment to either parties. Both the parties are hereby directed to give

their fullest co-operation for early disposal of the suit.

Consequently, connected miscellaneous petition is closed.

**21.02.2017**

Note: Issue order copy on 11.01.2018

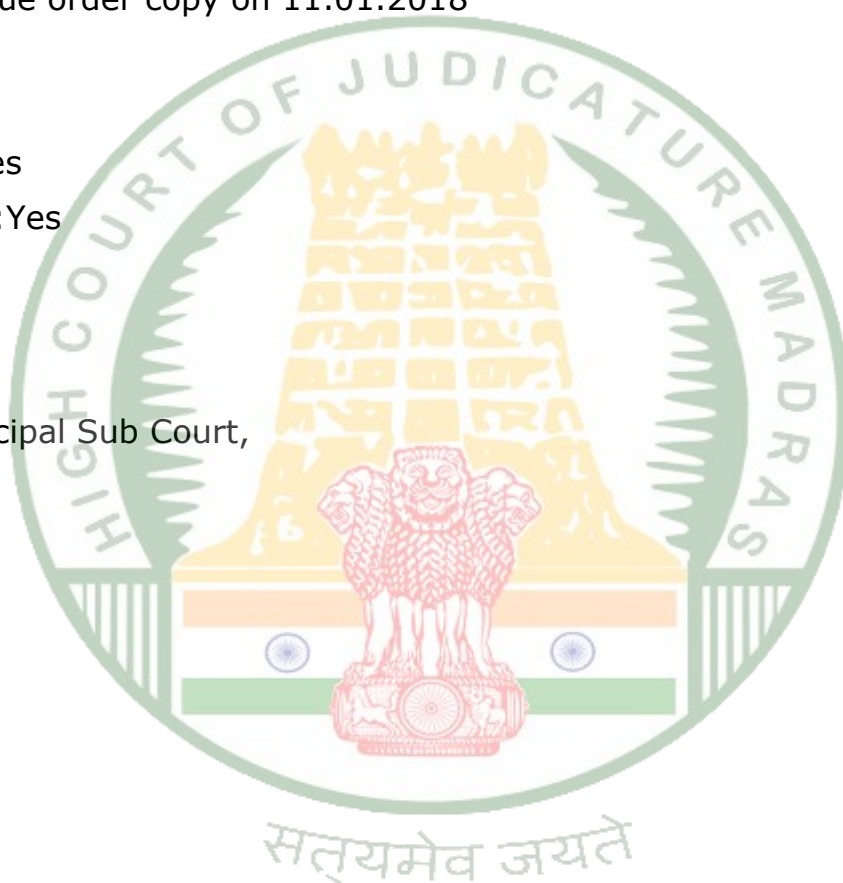
vs

Index: Yes

Internet: Yes

To

The Principal Sub Court,  
Erode.



WEB COPY

**M.V.MURALIDARAN,J.**

**VS**



**Pre-Delivery order made in  
CRP(NPD)No.3774 of 2012  
and  
M.P.No.1 of 2012**

**WEB COPY**

**21.02.2017**