

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 29.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN**C.M.A(MD)No.109 of 2016****and****C.M.P(MD)No.1623 of 2016**

J.Charles

... Appellant/Petitioner/
Petitioner/Respondent

Vs.

1.C.Annathai

2.J.Vijaya Sathya Selvi

... Respondents/Respondents/
Respondents/Petitioners

Prayer: Appeal filed under Order 43 Rule 1(c) of the Code of Civil Procedure, against the order dated 01.12.2015 passed in I.A.No.219 of 2015 in I.A.No.112 of 2014 in G.W.O.P.No.151 of 2013 on the file of the learned Principal District Judge, Thoothukudi.

For Appellant : Mr.G.Prabhu Rajadurai
for R.Sankar

For Respondents : Mr.T.Selvakumaran for R.1

Mr.R.Anand for R.2

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JUDGMENT

The husband, who had suffered an exparte decree for guardianship in G.W.O.P.No.151 of 2013 is the appellant.

2. The said proceedings was initiated by the maternal grandmother and maternal aunt of the minor child, whose mother had died due to illness. The proceedings were initiated in March 2013 and an exparte order was passed on 07.08.2013, after notices sent to the husband were returned as 'unclaimed' and paper publication was also effected. Even before the said exparte order came to be passed in August 2015, the husband had filed G.W.O.P.No.2015 of 2013 on the file of the Family Court at Chennai and the same is said to be pending even as of today.

3. On coming to know about the exparte order, the husband filed an application in I.A.No.112 of 2014 seeking to set aside the exparte order.



4. It appears that there was a delay of 98 days which was condoned by the Court below. Thereafter, the application in I.A.No.112 of 2014 came to be dismissed for default on 08.06.2015. On 17.06.2015, i.e., within 10 days from the date of dismissal for default, the present application in I.A.No.219 of 2015 seeking to restore I.A.No.112 of 2014. The reason given in the said application for restoration is that the Advocate Clerk has mistakenly noted the date of hearing as 10.06.2015 instead of 08.06.2015. The said application was opposed by tooth and nail by the maternal grandmother and maternal aunt, who are the respondents.

5. The learned Principal District Judge, Thoothukudi, who heard the application, without considering the reasons assigned for the absence on the fateful day, i.e., 08.06.2015, went into the merits of the matter and dismissed the application holding that it is not in the interest of the minor child.

6. I do not think that this approach could be justified when an application to restore an application which was dismissed for default, is filed with certain reasons. It is for the Court to consider those reasons and decide the matter and not to go into the merits of the claim of the parties and conclude the conduct of the father of the minor child will not be in her interest. I find that the very approach of the learned Principal District Judge is erroneous and therefore, the order of the learned Principal District Judge is liable to be set aside.

7. The Advocate Clerk noting the date of hearing wrongly is common, which happens in the office of every Counsel and taking into account the fact that the application has been filed almost immediately within 10 days from the date of dismissal, I do not think that the father of the minor child should be shut out from seeking guardianship of his own daughter without being afforded an opportunity of being heard.

8. Therefore, the order of the learned Principal District Judge, Thoothukudi, dated 01.12.2015 passed in I.A.No.219 of 2015 in I.A.No.112 of 2014 in G.W.O.P.No.151 of 2013, is set aside and I.A.No.112 of 2014 stands restored. The learned Principal District Judge, Thoothukudi, is directed to dispose of I.A.No.112 of 2014 on merits without being influenced by any observations made in this order or in the earlier orders passed by this Court. Considering the fact that the proceedings are pending for 4 years, the learned Principal District Judge, Thoothukudi, is directed to dispose of I.A.No.112 of 2014 as expeditiously as possible, in any case, not more than 22.09.2017.



9. In the result, this Civil Miscellaneous Appeal is allowed as above. No costs. Consequently, the connected civil miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

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/True Copy/

Sub Assistant Registrar

To

1.The Principal District Judge, Thoothukudi.

2.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.T.Selvakumaran, Advocate in SR.No.62744
+1cc to Mr.R.Babu Jeganath, Advocate in SR.No.62596
+1cc to Mr.R.Anand, Advocate in SR.No.63012

rsb

AE/MR KKR/SAR3/06.07.2017/3P/6C

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and
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