

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.11.2018

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.R.P.(NPD).No. 1706 of 2013

and

M.P.No.1 of 2013

Backiyalakshmi

...

Petitioner

Vs.

Madankumar

...

Respondent

Prayer :- The Civil Revision Petition has been filed under Section 115 of The Civil Procedure Code against the order and Decreetal order made in I.A.No.909 of 2012 in O.S.No.163 of 2010 on the file of the Principal District Munsif Court, Villupuram, dated 29.01.2013.

For Petitioner : Mr.V.S.Sivasundaram

Respondent : No appearance

ORDER

The instant revision petition has been filed challenging the order dated 29.01.2013 passed by the Principal District Munsif Court, Villupuram, in I.A.No.909 of 2012 in O.S.No.163 of 2010.

Brief facts leading to the filing of the revision:

2.The respondent has filed a suit O.S.No.163 of 2010 seeking for a declaration to declare the registered partition deed dated 17.04.2008 as null and void and has also sought for recovery of possession.

3.The petitioner is the 4th defendant in the suit and the remaining defendants are her mother, uncles and aunt. As seen from the plaint averments, the respondent claims that settlement deed executed in his favour by his grandfather Subburao Naidu on 07.06.1990 and was illegally cancelled on 30.08.1991. According to the respondent, he continues to be the absolute owner of the suit schedule property. Based on those averments in the plaint, he has sought for a declaratory relief and has also sought for recovery of possession.

4.The petitioner, who is the 4th defendant in the suit was set exparte on 08.10.2010. The 5th defendant, who is the mother of the respondent, filed her written statement the other defendants did not file their written statement and were set exparte by the trial Court. An exparte decree dated 08.10.2010 came to be passed in favour of the respondent in O.S.No.163 of 2010. Thereafter, the petitioner filed I.A.No.909 of 2012 in O.S.No.163 of 2010 seeking to condone the delay of 141 days in filing an application to set aside the exparte decree dated 08.10.2010.

5.The reason given by the petitioner in her affidavit filed in support of I.A.No.909 of 2012 for the delay of 141 days is that she is a widow and was suffering from Jaundice and was taking country treatment and because of her illness, she was unable to defend the suit. The respondent has also filed his counter in I.A.No.909 of 2012 denying the averments contained in I.A.No.909 of 2012 and stating that no sufficient reasons having been given by the petitioner for condoning the delay. The trial Court, by its order dated 29.01.2013 in I.A.No.909 of 2012 in O.S.No.163 of 2010, dismissed the said application on the sole ground that since the 5th defendant in the suit has filed her written statement and has also let in oral evidence, the judgment and decree dated 08.10.2010 passed in O.S.No.163 of 2010 is a judgement passed on merits and therefore, only an appeal is maintainable before the Higher Forum.

6.Aggrieved by the dismissal of I.A.No.909 of 2012 in O.S.No.163 of 2010, the instant revision has been filed.

Submission of the counsels

7.Heard Mr.V.S.Sivasundaram, learned counsel appearing for the petitioner and there is no representation on the side of the respondent, despite several opportunities given.

8. According to the learned counsel appearing for the petitioner, the reasons given in the affidavit filed in support of I.A.No.909 of 2012 by the petitioner are sufficient reasons for condonation of delay. He submitted that the petitioner is a widow and was suffering from Jaundice and only due to that reason, she could not enter appearance in the suit, which resulted in, the Court setting her ex parte and thereafter, passing an ex parte decree in favour of the respondent. Further, he submitted that the 5th defendant in the suit is the mother of the respondent and both of them were sailing together and therefore, according to him, the trial Court ought not to have rejected the application on the ground that the judgment passed by the trial Court is a judgment on merits and therefore, only an appeal is maintainable. He drew the attention of this Court to Order 9 Rule 13 CPC and also to the explanation contained thereunder and submitted that when no appeal has been filed against the impugned order, an application under Order 9 Rule 13 CPC is maintainable. He would also submit that except for the 5th defendant, the remaining defendants were also set ex parte by the Court.

DISCUSSION:

9. This Court has perused the impugned order. The Application I.A.No.909 of 2012 filed by the petitioner has been dismissed only on the ground that since the 5th defendant has filed her written statement and

has also let in oral evidence, the judgement passed is a judgment on merits. The trial Court has not considered the reasons given by the petitioner in I.A.No.909 of 2012 for condonation of delay. The petitioner is the 4th defendant in the suit and she is the aunt of the respondent. The first defendant in the suit is the wife and the second and third defendants are the sons of late Subburao Naidu and the 5th defendant is the daughter of late Subburao Naidu.

10.It is the case of the respondent that a settlement deed was executed in his favour by late Subburao Naidu, which was subsequently cancelled illegally. Subsequent to the cancellation of the settlement deed, the defendants in the suit have executed a registered partition deed dated 17.04.2008. The respondent has sought for declaration that the said registered partition deed dated 17.04.2008 as null and void and has also sought for recovery of possession.

11.It is the case of the petitioner that the 5th defendant in the suit has colluded with the respondent. The petitioner has also stated in her affidavit filed in support of I.A.No.909 of 2012 seeking to set aside the exparte decree that she was suffering from Jaundice and is a widow and only due to that reason, she was unable to defend the suit earlier. Without considering the reasons given in the affidavit filed in support of I.A.No.909 of 2012, the trial Court has rejected the application filed by

the petitioner summarily only on the ground that it is not maintainable and only an appeal is maintainable against the said order. Admittedly, no appeal has been filed till date against the judgment and decree dated 08.10.2010 passed in O.S.No.163 of 2010. The Trial Court ought to have correctly appreciated the defences, the petitioner proposes to raise in the suit. According to the petitioner, the defendants have partitioned the suit schedule property by the registered partition deed dated 17.04.2008. But under the ex parte decree, there is no reference to the partition deed and there is no findings on the validity of the same. Further, only the fifth defendant in the suit alone has filed her written statement and the remaining defendants have not filed their written statement and they have also been set ex parte and an ex parte decree has been passed against them also. No appeal has also been filed against the ex parte decree by any of the aggrieved parties. Considering all these factors, this Court is of the considered view that the Trial Court ought not to have rejected the application filed by the petitioner to condone the delay in filing an application to set aside the ex parte decree on the ground that an application under Order 9 Rule 13 of CPC is not maintainable and therefore, the findings of the Trial Court is an erroneous finding and this Court is also satisfied with the reasons given by the petitioner for condonation of delay in I.A.No.909 of 2012 in O.S.No.163 of 2010.

CONCLUSION:

12. In the light of the above observations, the order order dated 29.01.2013 passed by the Principal District Munsif Court, Villupuram made in I.A.No.909 of 2012 in O.S.No.163 of 2010 is hereby set aside. Accordingly, the Civil Revision Petition is allowed as prayed for.

13. Due to the long pendency of the suit, the trial Court is directed to dispose of the suit within a period of 6 months from the date of the receipt of a copy of this order.

Index : Yes / No
Internet : Yes / No

29.11.2018

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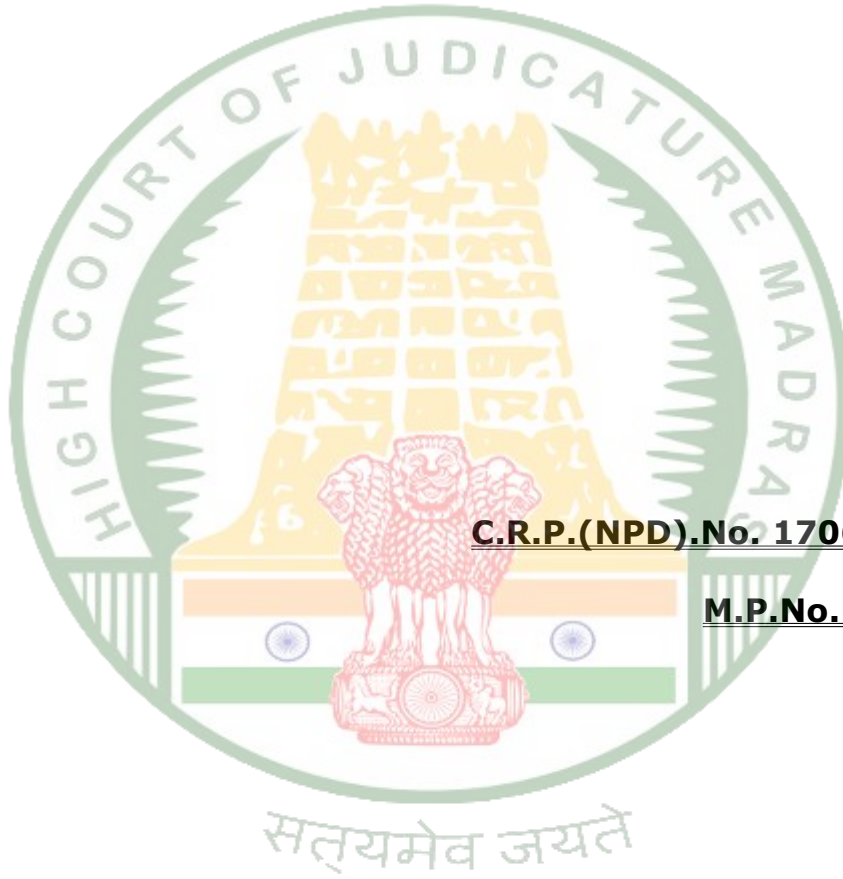
To
The Principal District Munsif Court,
Villupuram.

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ABDUL QUDDHOSE,J.

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