

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2018

CORAM:

The HONOURABLE **MS. JUSTICE V.M.VELUMANI**

C.R.P.(NPD)No.4241 of 2014
and M.P.No.1 of 2014

1.Rathnabai
2.Yashodha
3.Devika
4.Sarasu

Murugammal (died)

5.A.Irudhayanathan
6.A.Fathima
7.A.Robert

... Petitioners

1.Saroja
2.Banumathi
3.S.Kumar
4.S.Mani
5.Loganayaki
6.Prabavathi

T.Velayudham (died)

7.Mani

Dhanabhakiyam (died)
Sakunthala (died)

8.Deivanayagi

.. Respondents



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Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the fair and decretal order dated 23.07.2014 made in C.M.P.No.926 of 2012 in A.S.SR.No.39022 of 2011 on the file of the Principal City Civil Court, Chennai.

For Petitioners : M/S.P.V.Rajeswari

For R1 to R6 : Mr.G.Saravanan

For R7 & R8 : No appearance

ORDER

The Civil Revision Petition is filed against the fair and decretal order dated 23.07.2014 made in C.M.P.No.926 of 2012 in A.S.SR.No.39022 of 2011 on the file of the Principal City Civil Court, Chennai.

2. The petitioners 1 to 4 are defendants 7 to 10, petitioners 5 to 7 are the legal heirs of the 6th defendant, respondents 1 to 6 are the plaintiffs and respondents 7 & 8 are defendants 2 & 5 in O.S.No.12665 of 1996 on the file of the V Assistant City Civil Court, Chennai. The respondents 1 to 6 filed the said suit for partition of the suit property claiming 1/3rd share. They initially filed suit against one Velayutham (since deceased), Mani and Danabhakiyam. The respondents 1 to 6 are the legal heirs of one T.Sivanesan, who is second son of one

Thiruvaimozhi. First defendant/T.Velayutham is first son and third defendant/Danabakkiyam is wife of the said Thiruvaimozhi. The second defendant Mani is son of first defendant/T.Velayutham. The suit property belonged to Thiruvaimozhi. The petitioners 1 to 4 and mother of the petitioners 5 to 7 are the daughters of Thiruvaimozhi. The mother of the petitioners 1 to 4 viz., Danabhakiyam was impleaded as party defendant initially in the suit. Pending suit, Danabhakiyam, wife of Thiruvaimozhi died. After the death of their mother Danabhakiyam, the petitioners 1 to 4, mother of the petitioners 5 to 7, one Sakunthala, wife of Velayutham/first defendant and Deivanayagi, daughter of Velayutham, were impleaded as party defendants 4 to 10.

3. According to the petitioners 1 to 4, notice in the impleading petition was not served on them. An exparte order was passed. After impleading them, no suit summon was served on them. They came to know about the same, when the publication was effected in Makkal Kural newspaper in final decree application. They filed I.A.No.20788 of 2008 to set aside the exparte preliminary decree dated 07.01.2004. The said application was dismissed on 02.02.2010 on the ground that the preliminary decree was passed on merits after contest. The respondents 7 and 8 and one Sakunthala filed A.S.No.381 of 2004

against the preliminary decree and the same was dismissed confirming the preliminary decree passed in O.S.No.12665 of 1996 dated 07.01.2004 and rights of the petitioners are not affected by the preliminary decree. The petitioners filed the Civil Revision Petition challenging the said judgment and decree dated 15.09.2006 made in A.S.No.381 of 2004. The said Civil Revision Petition was not proceeded with subsequently. After that, the petitioners herein filed appeal along with the present petition C.M.P.No.926 of 2012 for condonation of delay of 2754 days in filing appeal against the preliminary decree dated 07.01.2004 made in O.S.No.12665 of 1996.

4. According to the respondents 1 to 6, the application in I.A.No.20788 of 2010 filed by the petitioners 1 to 4 to set aside exparte decree was dismissed and they have not challenged the same. The petitioners were aware of the preliminary decree in the year 2008 itself. The respondents 1 to 6 further contended that the respondents 7 and 8 along with one Sakunthala filed A.S.No.381 of 2004 and the same was dismissed on 15.09.2006 confirming the preliminary decree dated 07.01.2004 passed in O.S.No.12665 of 1996. The preliminary decree passed on 07.01.2004 is not an exparte decree and prayed for dismissal of the petition.

5. Before the learned Judge, fourth petitioner Sarasu was examined as P.W.1 and marked five documents as Exs.P1 to P5. On the side of the respondents, no oral and documentary evidence was let in.

6. The learned Judge considering the averments made in the affidavit, counter affidavit and materials available on record, dismissed the petition on the ground that the preliminary decree was confirmed in A.S.No.381 of 2004 and I.A.No.20788 of 2008 filed by the petitioners 1 to 4 to set aside the exparte decree was dismissed and the petitioners have not proceeded with the Civil Revision Petition filed by them and the petitioners have not given any valid reason for condoning the delay from 02.02.2010 to 19.06.2011.

7. Against the said order of dismissal dated 23.07.2014 made in C.M.P.No.926 of 2012 in A.S.SR.No.39022 of 2011, the present Civil Revision Petition is filed by the petitioners.

8. Heard the learned counsel for the petitioners as well as the respondents 1 to 6 and perused the materials available on record.

9. The learned counsel for the petitioners contended that no notice was served on the petitioners in the impleading petition. After impleading them in the suit, no suit summon was served on them. This contention was not denied by the contesting respondents. The Court below also did not hold that notice in the impleading petition and suit summon were served on the petitioners.

10. The learned counsel for the respondents 1 to 6 contended that the petitioners had knowledge about the preliminary decree in the year 2008 itself. I.A.No.20788 of 2008 filed by the petitioners 1 to 4 was dismissed on 02.02.2010, but they filed the present petition C.M.P.No.926 of 2012 on 04.04.2011 i.e. after 14 months and there is no explanation for the delay.

11. From the materials available on record, it is seen that the application filed by the petitioners to set aside exparte preliminary decree was dismissed on the ground that the preliminary decree was passed on merits after contest and appeal filed by the respondents 7, 8 and one Sakunthala in A.S.No.381 of 2004 was also dismissed. The Court below failed to see that against the said judgment and decree passed in A.S.No.381 of 2004, the petitioners filed Civil Revision

Petition and subsequently the petitioners did not proceed with the said Civil Revision Petition, but filed another appeal. The petitioners have let in evidence and disproved the same.

12. On consideration of the above facts, it is clear that the petitioners are diligently seeking their remedy to set aside the preliminary decree. The Court below erred in rejecting the plea of the petitioners either to set aside the preliminary decree or to condone the delay in filing the appeal on the ground that the preliminary decree was passed on merits and the appeal filed by the other respondents was dismissed. The learned Judge failed to consider the application filed by the petitioners to set aside the exparte decree and the Civil Revision Petition filed challenging the said order of dismissal.

13. It is a well settled 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 have given acceptable and valid reason and the intention of the parties should 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.

14. In the present case, the right claimed by the petitioners is different from the right claimed by the respondents 7, 8 and one Sakunthala. In the circumstances, in the interest of justice, the petitioners must be given an opportunity to put forth their case on merits.

15. For the above reason, the Civil Revision Petition is allowed and the impugned order of the learned Judge is liable to be set aside and it is hereby set aside. The learned Judge is directed to number the appeal, if it is otherwise in order and dispose of the same on merits and in accordance with law after giving opportunity to both sides. If the appeal is numbered, considering the fact that the suit is of the year 1990, the learned Judge is directed to dispose of the appeal within a period of six months from the date of numbering of the appeal. No costs. Consequently, connected Miscellaneous Petition is closed.

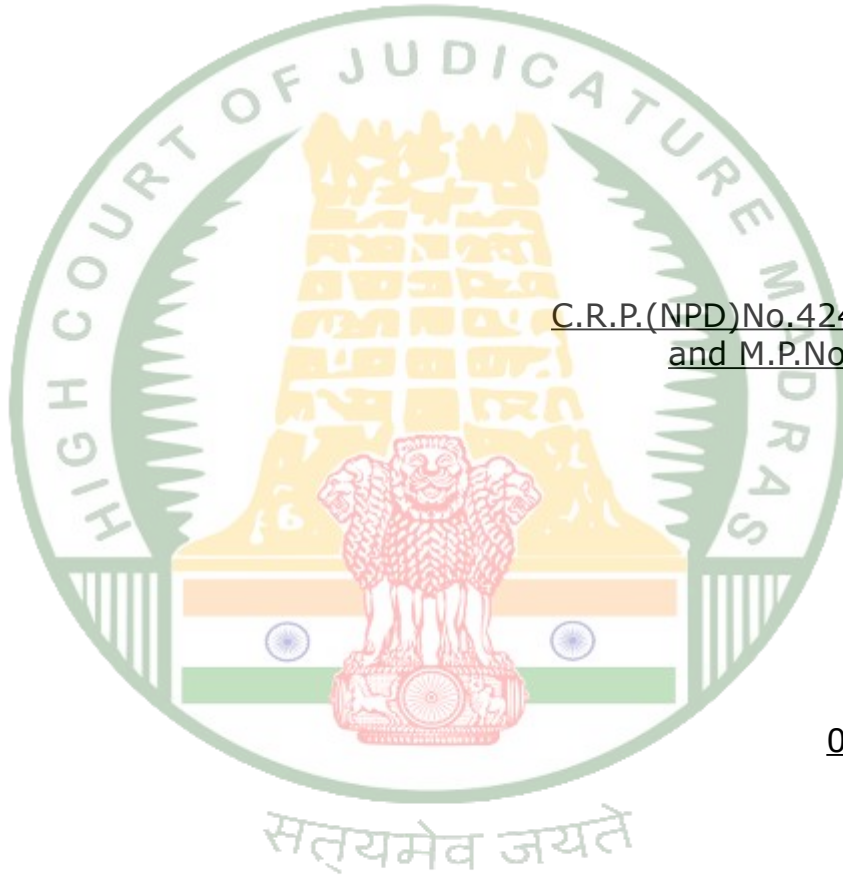
01.02.2018

Index:Yes/No
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To
The Principal Judge, City Civil Court, Chennai.

V.M.VELUMANI,J.

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