

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.596 of 2014
& M.P.No.1 of 2014

1.Banumathy (died)
2.Sumathi
3.Geetha
4.Srinivasan
5.Dillibabu

.. Petitioners

(Petitioners 2 to 4 recorded as
Lrs of the deceased 1st petitioner
vide Court order dated 12.02.2018
made in C.R.P.No.596/2014)

Vs.

Madurai

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 24.12.2012 made in I.A.No.545 of 2012 in O.S.No.886 of 2004 on the file of the Additional District Munsif, Poonamallee.

For Petitioners : Mr.M.Devendran

For Respondent : M/s.C.Harini

ORDER

This Civil Revision Petition has been filed against the fair and decretal order dated 24.12.2012 made in I.A.No.545 of 2012 in

O.S.No.886 of 2004 on the file of the Additional District Munsif, Poonamallee.

2.The petitioners are the defendants 2 to 6 and respondent is the plaintiff in O.S.No.886 of 2004 on the file of the Additional District Munsif, Poonamallee. The respondent filed the said suit for partition against one K.Manickam, petitioners and three others, who are the purchasers of the property. The respondent is one of the sons of Kanniappa Chetty, the first defendant K.Manickam is another son. The petitioners are legal heirs of K.Egambaram, the third son of Kanniappa Chetty. According to the petitioners, the first defendant K.Manickam who was retired Tahsildar was conducting the case on behalf of himself and on behalf of the petitioners. The first defendant died. His legal heirs were impleaded as defendants 10 to 13. The petitioners had bonafide belief that after death of first defendant, K.Manickam, his legal heirs, the defendants 10 to 13 are conducting the case. The first petitioner is a widow and the petitioners 2 to 5 are her children. The petitioners came to know that defendants 10 to 13 did not conduct the suit and petitioners and defendants 10 to 13 were set exparte and exparte preliminary decree was passed on 20.02.2012. The petitioners filed I.A.No.545 of 2012 to condone the delay of 77 days in filing the petition to set aside the exparte preliminary decree.

3.The respondent filed counter affidavit and denied all the averments made in the affidavit filed in support of the above application and contended that the decree is not an exparte decree. The defendants 7 to 9 contested the suit and preliminary decree was passed on merits. It is not correct to state that first defendant was looking after the case. He is only a formal party to the suit and prayed for dismissal of the application.

4.The learned Judge considering the averments in the affidavit and counter affidavit, dismissed the application, holding that the preliminary decree is passed on merits and petitioners have to file only appeal, if they are aggrieved.

5.Against the said order of dismissal dated 24.12.2012 made in I.A.No.545 of 2012 in O.S.No.886 of 2004, the petitioners have come out with the present Civil Revision Petition.

6.Heard the learned counsel for the petitioners as well as the respondent and perused the materials available on record.

7.From the materials available on record, it is seen that the petitioners were set exparte and exparte preliminary decree was

passed on 20.02.2012 against them. The application filed by the petitioners to condone the delay of 77 days in filing the petition to set aside the ex parte decree was dismissed on the ground that the preliminary decree was passed on merits and it is not an ex parte decree. As per first proviso to Order IX Rule 13 of C.P.C, even if the preliminary decree is passed on merits against some of the defendants, the preliminary decree can be set aside against all the defendants if sufficient reason is given by defendants who were set ex parte. Order IX Rule 13 reads as follows:

Order IX Rule 13:

"Setting aside decrees ex parte

13. Setting aside decree ex parte against defendant—

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such

a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[164] [Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim]

[165] [Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]"

8. The petitioners have stated that only the first defendant who is the brother-in-law of the first petitioner and paternal uncle of the petitioners 2 to 5 was conducting the case and pending suit, he died. His legal heirs did not contest the suit. The learned Judge has not considered this contention and dismissed the application only on the ground that the preliminary decree is not an ex parte decree. It is an erroneous reasoning and is liable to be set aside in view of the order IX Rule 13 of C.P.C.

9.In the result, the Civil Revision Petition is allowed setting aside the order dated 24.12.2012 made in I.A.No.545 of 2012 in O.S.No.886 of 2004. No costs. Consequently, connected Miscellaneous Petition is closed. Since the suit is of the year 2004, the learned Judge is directed to dispose of the suit as expeditiously as possible, in any event, not later than three (3) months from the date of receipt of a copy of this order.

12.02.2018

Index: Yes/No
Internet: Yes/No
gsa

To

The Additional District Munsif,
Poonamallee.

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V.M.VELUMANI, J.

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