

A.No.5143 of 2018
& A.No.4639 of 2018
in C.S.No.703 of 2003

DR.ANITA SUMANTH, J.

A.No.5143 of 2018 prays for condonation of delay of 183 days in filing of A.No.4639 of 2017, seeking to set aside ~~exparte~~ decree dated 06.03.2008.

2. The suit was filed praying for a direction to the defendants to pay a sum of Rs.10,00,000/- with future interest at the rate of 12% per annum from the date of plaint till date of realization towards damage caused to the plaintiffs' property, a mandatory injunction directing the defendants to maintain a gap of three feet gap from the plaintiffs' property while effecting constructing upon their property and to direct the defendants to pay the costs of suit.

3. The suit was decreed on 06.03.2008 as against the defendants in suit arrayed as respondents 2 and 3 in the present applications. The applicant is a third party to suit as originally filed and a predecessor in title to the defendants originally arrayed, impleaded as the 4th defendant by virtue of my order in A.7771 of 2018 of even date.

4. The suit property was purchased by the parents of the applicant from respondents 2 and 3 under a registered sale deed dated 07.10.2003. The suit had been instituted on 06.10.2003 and the transaction of sale had thus been occasioned even during the pendency of the suit. The applicants' parents were bona fide purchasers of the property who were unaware of the pendency of the suit.

5. A settlement deed had been executed on 27.01.2016 registered as document 72 of 2016 before the Office of the Sub-Registrar, Sowcarpet, settling the suit property in favour of the present applicant.

6. According to the applicant, when he had commenced construction upon the property in or around June 2017, R1 in the application/plaintiff in suit, raised objections and put him to notice about the permanent injunction obtained by him from the court. It only at this juncture that the applicant came to know about the ex parte decree passed in C.S.No.703 of 2003 on 06.03.2008 as against the original vendors.

7. The applicant points out that the cause title in suit is incorrect, arraying the original vendors of the property who are among others 'Jawaharlal P.Mehta' and 'Bhismachandra P.Mehta', as 'Jhaveri Lal' and 'Bhisma' respectively. This mis-description was probably instrumental in their failing to appear or contest the suit resulting in the exparte decree.

8. Application No.4639 of 2017 has thus been filed seeking setting aside of the ex parte decree passed. Notice was ordered in the application in September, 2017 but could not be served as the 1st respondent /plaintiff was under incarceration. Notice was thus ordered to the Sub-Jail, Poonamallee on 03.11.2017. Substituted service was also permitted to be effected by order dated 21.11.2017 and on 11.12.2017, the exparte order has, in fact, been set aside in the following terms:

'Pursuant to the order dated 21.11.2017, publication has been effected in one issue of 'News today' as well as 'Malai Murasu'. Despite such service, the 1st respondent/plaintiff has not chosen to appeal.'

Considering the reasons assigned in the affidavit and the nature of the ex parte decree is one for suit property, and the same is accordingly set aside.'

9. Thereafter, the application has been listed before Court yet again on 09.08.2018. The Registry has evidently listed the application by mistake seeing as the same has already been ordered on 11.12.2017 by this Court. Be that as it may, the aforesaid order was not brought to the notice of the Court by the counsel for the applicant on 09.08.2018 on which date, there was representation on behalf of the 1st respondent as well. The matter has been heard consistently on several occasions thereafter in the presence of the learned counsel for the applicant and the 1st respondent/plaintiff appearing in person. It is in the aforesaid context that the present detailed order is passed.

10. A preliminary legal objection was raised by R1 to the effect that the applicant ought not to seek setting aside of the ex parte decree without filing an application in terms of Order XXII Rule 10 seeking leave of this court to implead himself. According to R1, the applicant ought to have obtained the leave of the Court to continue the proceedings pursuant to assignment of the matter to his interest, pending suit. Said leave according to him has not been obtained and as such the application ought to be dismissed as not maintainable.

11. However, an application has already been filed by the applicant, A.No.7771 of 2018 in terms of Order XXII Rule 10 and the 1st respondent has been put to notice therein and is contesting the same. I have, by my order of even date, ordered the said Application granting leave to the applicant to implead himself as the 4th respondent in the suit and directing that suitable

amendments be made within two (2) weeks from the date of receipt of the order.

12. In such circumstances, when the applicants are seen to have taken appropriate steps to seek the leave of the Court as required in terms of Order XXII Rule 10 and such leave has also been granted, the objection raised by R1 is rejected.

13. In counter to the present application, R1 alleges on merits that the applicant had been put to notice about the ex parte decree even as early as in November 2016. According to the respondent, a Police complaint had been filed complaining against the illegal construction being put up by the applicant, despite which the present application was filed only in June, 2017. Two photographs of construction activities have been filed and an additional typed set containing a photograph of a police officer stated to taken in the suit property has also been filed in support of the submissions of R1. In all, R1 contends that the application is barred by time and liable to be dismissed as such.

14. This has been denied by the applicant. However, without prejudice to the contention that there is no delay in filing of the present application, and by way of abundant caution, the applicant has sought condonation of delay of 183 days from the date of knowledge of the ex parte decree on 16.11.2016 as alleged by R1.

15. I would first advert to the question of whether there is any delay in filing of the present application. According to R1 he had brought the ex parte decree to the knowledge of the applicant on 16.11.2016 and had also filed a police complaint against him. This averment is denied by the applicant who

16. The applicant points out that R1 had obtained an ex parte injunction on 24.11.2016 from the learned Master in A.No.1052 of 2016, in E.P.No.111 of 2016 in regard to the putting up of construction on the 'B' Schedule property as per the decree passed in C.S.No.703 of 2003 but there was no mention therein about the police complaint or any of the averments set out in the present counter. The entire narration in counter is thus, according to the applicant, contrary to fact.

17. Be that as it may and even assuming that police complaint had been filed and action had been initiated by R1 against the construction activities that have been carried out by the applicant, there is nothing on record to indicate that the copy of the exparte decree had, in fact, been furnished to the applicant herein by R1. I am thus of the view that there is no delay in the applicant having approached to this Court with the present application.

18. Now coming to the setting aside of the exparte order itself, the applicant is, admittedly, a bona fide purchaser of the property, the sale deed for purchase of the property having been entered into one day prior to the ex party decree. This position is not contested by R1. The sale deed has been executed during the pendency of the suit and this position is also not denied. It is also not denied that the array of parties in the original cause-title features the names of the vendors of the property incorrectly. Though, I am not concerned with the reflection of the names of the original defendants in the suit, this point assumes importance solely as a possible explanation as to why the suit was not contested by the original defendants. In the aforesaid circumstances, I believe that the present applicant should not be prejudiced and should be permitted to approach

this Court seeking to set aside the exparte decree and contest the same on merits.

19. In the light of the fact the applicant is the successor-in-title to the original defendants in the light of sale deed dated 07.10.2003 and settlement deed dated 27.01.2016, this position not being disputed by R1, I am of the categoric view that the present applicant should be permitted to prosecute the suit on behalf of the original defendants in the interests of substantial justice.

20. The array of defendants in suit, admittedly is incorrect and there is a marked difference in the names of the original owners of the property as per the cause title in the plaint to the suit and the sale deed where the full names are arrayed. This could well have been a reason why they did not cause appearance in the first place to contest the suit. Even at this juncture, though notice in these applications has been issued to R2 and R3, they have not entered appearance in the matter.

21. For the aforesaid reasons, I am inclined to set aside the judgment and decree dated 06.03.2008 as against R2 and R3 in this application and restore the same to file.

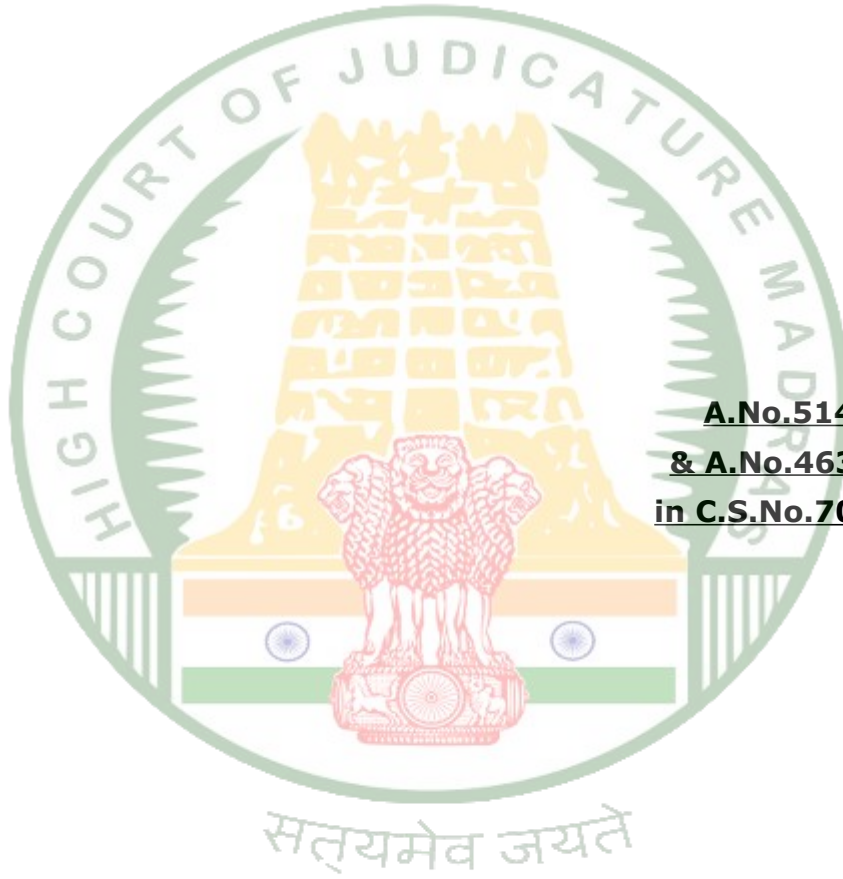
22. Accordingly, A.No.5143 of 2018 seeking condonation of delay of 183 days by way of abundant caution is allowed, as is A.No.4639 of 2017.

15.11.2018

rkp/sl

Dr.ANITA SUMANTH,J.

rkp/sl



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Dated:15.11.2018