

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.04.2019

CORAM :

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

C.R.P. (NPD) No.879 of 2009

and

M.P. No.1 of 2009

S.Kannan

... Revision Petitioner

Vs.

1.I.Sivalingam (Died)

2.S.Kalaiselvi

3.S.Inbarasan

4.S.Vivekkumar

5.S.Iswaryah

... Respondents

[R2 to R5 brought on record as LR's of the deceased
sole respondent vide Court order dated 26.02.2019
made in M.P.No.3 of 2011 in CRP NPD No.879 of 2009]

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure to set aside the order dated 30.07.2008 passed in I.A.No.3964 of 2008 in O.S.No.4222 of 1998 on the file of the VIII Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.R.Kannan

For Respondents : Mr.K.P.Sathish Kumar
for R2 to R5

ORDER

This Civil Revision Petition has been filed against the order of the trial Court, dismissing the application to condone the delay of 2619 days in filing an application to set aside the ex-parte decree dated 12.11.1999.

2.The suit in O.S.No.4222 of 1998 was originally filed by the 1st respondent/plaintiff for permanent injunction against the revision petitioner/defendant for an extent of eight cents of land.

3.For the sake of convenience, the parties herein will be referred to by the rank as arrayed in the suit.

4.It is averred by the plaintiff in the plaint, as if, the entire suit property devolved on him after the demise of his father and he is in possession of the suit property and thereby, he sought for permanent injunction against the defendant. Whereas, the defendant, in his application, has contended that, four cents of land was already sold by the plaintiff's father in the year 1951 vide Document No.963 of 1951 and the purchaser, in turn, sold the same to his father on 04.03.1961. The above aspect has been suppressed in the plaint and the father's name and proper address of the defendant have also not been given in the plaint. Summons have not been served on the defendant and only paper publication was effected. When the

defendant came to know about the exparte decree passed against him, as early as in the year 1995, he immediately engaged a counsel to file an application to set aside the exparte decree and he also filed a suit in O.S.No.7319 of 2006 for injunction. Subsequently, the counsel engaged by the defendant became an officer of the Railways Claims Tribunal, even which fact, the defendant was not aware of. Hence, the defendant prayed for condonation of delay.

5.However, the trial Court dismissed the application mainly on the ground that, another suit in O.S.No.7319 of 2006 had been filed by the defendant and there was no explanation for each day's delay in filing an application to set aside the exparte decree in O.S.No.4222 of 1998.

6.Heard the learned counsel for both sides.

7.Though, the delay appears to be huge, the fact remains that, summons have not been served on the defendant and only substituted service was effected and thereafter, exparte decree was passed on 12.11.1999. The above fact itself fairly supports the defendant's contention that proper address of the defendant has not been given in the plaint.

8.Be that as it may, yet another fact has to be taken note of. The plaintiff in the suit has contended that he is the owner of the entire extent of eight cents and the suit property has devolved on him after the demise of his father. However, admitted fact is that, in the year 1951 itself, four cents of the land was sold by the plaintiff's father and thereafter, the defendant's father has purchased the same in the year 1961. These facts are totally suppressed in the plaint, whereas, the plaint proceeds to show as if, the entire property belongs to the plaintiff.

9.It is also seen that the defendant has filed another suit in O.S.No.7319 of 2006, seeking injunction in respect of four cents. Thereafter, he has filed an application for condoning the delay in filing an application to set aside the exparte decree. Though, the delay appears to be huge, delay is not a matter. When a party wants to take advantage of the exparte decree, which has come to be passed on suppression of material facts and when title itself is in dispute and admittedly, summons have not been served and only paper publication has been effected, I am of the view that the delay cannot be considered a big issue. No doubt, each day of delay has to be explained. The affidavit filed by the petitioner/defendant fairly explains the circumstances under which, the delay has occasioned. When the explanation appear to be more appropriate, probable and acceptable, the Court has to necessarily adopt a liberal approach in the interests of substantial justice.

10. Accordingly, the order of the trial Court in I.A.No.3964 of 2008 in O.S.No.4222 of 1998, dismissing the application filed to condone the delay of 2619 days in filing an application to set aside the ex-parte decree is set aside. The trial Court shall decide on merits the application under Order IX Rule 13 of CPC, filed by the defendant, keeping in mind, the rights of all the parties, particularly, the sale deed in favour of the defendant in the property, within a period of three months from the date of receipt of a copy of this order.

11. With the above observations, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

05.04.2019

mkn

Index : Yes / No
Internet : Yes / No
Speaking order / Nonspeaking order

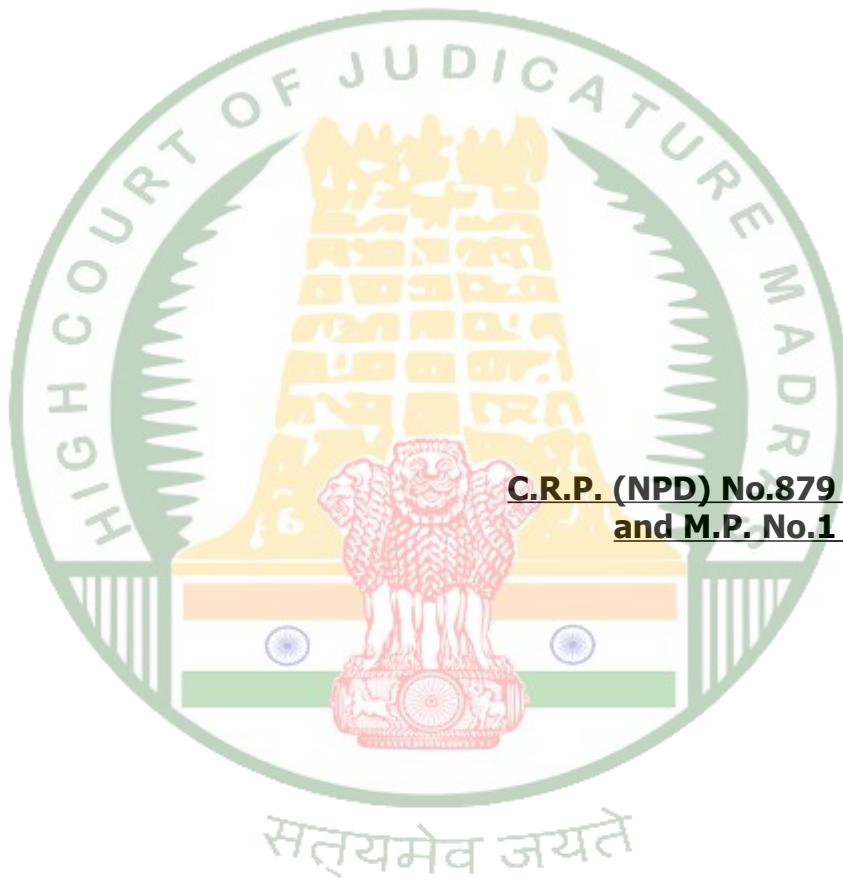
To

The VIII Assistant Judge,
City Civil Court,
Chennai.

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N. SATHISH KUMAR, J.

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