

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P(PD).No.563 of 2019

&

C.M.P.No.3757 of 2019

1.Mrs.Lalitha

2.Mr.G.Murugan

3.G.Abirami

4.Ms.G.Vijayalakshmi

...Petitioners

Vs

1.Mrs.Jayalakshmi

2.Mrs.Yasodha

3.Mrs.Saraswathy

4.Mrs.Parvathy

5.Mr.G.Chandrasekaran

... Respondents

Prayer: Civil Revision Petition is filed under Article 227 of Constitution of India against the order dated 12.11.2018 in I.A.No.16124 of 2017 in O.S.No.12140 of 1996 on the file of VII Assistant City Civil Court, Chennai.

For Petitioners : Mr.S.Jeyakumar

For Respondents : Mr.M.Murugan

ORDER

The legal representatives of the 1st defendant in the suit O.S.No.12140 of 1996 on the file of the VII Assistant City Civil Court, Chennai are the revision petitioners before this Court and they seek to challenge the order passed by the learned VII Assistant Judge dismissing the application filed by the revision petitioners to declare that the suit O.S.No.12140 of 1996 as abated. Before proceeding to dispose of the Civil Revision Petition it is necessary to briefly touch upon the filing of suit O.S.No.12140 of 1996 and the subsequent pleadings leading upto

the filing of the impugned petition.

2.The Respondents 1 to 3 had filed the suit O.S.No.12140 of 1996 on the file of the VII Assistant City Civil Judge, Chennai against one Govindharaj, the husband of the 1st petitioner herein and the father of petitioners 2 to 4 herein for a partition and separate possession of their 1/6th share in the suit property.

3.It is the case of the plaintiffs that the suit property belonged to their father K.Gopal who died intestate in the year 1994 leaving behind him surviving the respondents herein and the said Govindaraj. Despite several requests to the petitioners to partition the properties amicably and share the rental incomes there was no response from the brothers constraining the plaintiffs namely respondents 1 to 3 herein to file the said suit.

4.Despite notice being served on defendants 1 and 2 they had not chosen to appear before the Court and was set ex parte

on 10.09.1998 and ex parte preliminary decree was passed. It is thereafter seen that the respondents 1 to 3 herein had approached their brothers to partition the properties as per the preliminary decree. The brothers kept delaying the partition and meanwhile the 1st defendant Govindaraj had died.

5.The respondents 1 to 3/plaintiffs had not filed a final decree proceedings since the brothers had assured that they will workout an amicable settlement and this promise was also reiterated by the petitioners herein. The plaintiffs/respondents 1 to 3 herein realized that the brothers had no intention of complying with the preliminary decree.

6.The plaintiffs had taken out an application I.A.No.16076 of 2009 for impleading the respondents 2 to 5 herein as defendants 3 to 6 in the suit and I.A.No.16077 of 2009 for passing final decree in terms of the preliminary decree and I.A.No.16078 of 2009 for appointing an Advocate Commissioner

to divide the suit property into six equal shares and allot one such share to each of the plaintiffs and thereafter to determine the mesne profits.

7.It is seen from the records that one Mr.K.G.Senthil Kumar had entered appearance for the 2nd defendant/6th respondent and Mr.K.Ramamoorthy had entered appearance on behalf of the respondents 3 to 6 in the interlocutory application who are the petitioners 1,3 and 4 herein and the 6th respondent was set ex parte.

8.The Advocate Commissioner was appointed by an order dated 18.02.2010 in I.A.No.16078 of 2009. Pursuant to the warrant issued to her, the Advocate Commissioner had issued notice to the two counsels namely K.G.Senthil Kumar and K.Ramamoorthy informing them that she is intended to visit the suit property on 27.03.2010. The said notice has been received by the Counsel K.G.Senthil Kumar on 24.03.2010 and on behalf

of K.Ramamoorthy on 25.03.2010 at 3.30pm.

9.From the evidence of proceedings dated 27.03.2010 it is seen that the Advocate Commissioner had gone to the suit property for inspection and inspection had commenced at 4.50pm. The 1st, 2nd and 4th petitioner herein and the 6th respondent were present . The notes of proceedings have also been signed by the counsels as well as the parties who are present at the time of inspection. Thereafter the Advocate Commissioner had also submitted her report on 20.08.2010 in which once again she has reiterated the presence of the petitioners 1, 2 and 4 herein and the 6th respondent.

10.The Advocate Commissioner has clearly stated that the plaintiffs were absent after the submission of the report since the Advocate Commissioner had opined that the scope of dividing the property was not possible without demolishing the property. The learned Judge had directed the parties to invoke provisions of the

Partition Act for a sale of the suit properties since the petitioners herein had not entered appearance notice was directed to them for the hearing on 15.09.2016.

11.It is seen that on 28.09.2016 the petitioners have taken out an application in I.A.No.11663 of 2016 to condone the delay of 6,589 days in filing the application to set aside ex parte decree dated 10.09.1998 (nearly 18 years). In the said application they had contended that it was only when they received the notice dated 30.08.2016 asking them to appear before this Court on 15.09.2016 that they had come to know about the ex parte decree.

12.They would further contend that from a perusal of the suit records they had come to know that I.A.Nos.16076 to 16078 of 2009 had been allowed and that one K.Ramamoorthy had entered appearance on behalf of the 2nd petitioner/6th respondent herein. They have contended that the 2nd petitioner

had not engaged the service of the said K.Ramamoorthy and that the signature in the affidavit has been misused by the 2nd petitioner/6th respondent herein. Further in the very same affidavit the petitioner has contended that the services of the Advocate K.Ramamoorthy was acknowledged by his illiterate mother who could not read, right or understand English or Tamil and that they were not informed about pendency of the suit or the stage of the suit.

13.The revision petitioners has also initiated proceedings against the said K.Ramamoorthy by filing a complaint to the Bar Council of Tamil Nadu dated 16.11.2006, however, in the typed set of papers that have been enclosed by the revision petitioners there are two letters 08.10.2016 and 24.10.2016 addressed by the 2nd petitioner to the said K.Ramamoorthy Advocate. In these letters there is no statement made by the revision petitioners that they have not acknowledged the services of K.Ramamoorthy on the contrary the very opening sentence of the letter dated

08.10.2016 is to the effect that the party was very much aware about the pendency of the suit for partition and the fact that the suit was adjourned to 21.10.2016.

12.Both these letters only request the counsel concerned to return back the entire papers and to give consent to the revision petitioners for engaging a new counsel. Thereafter over a year later the revision petitioners have come forward with the impugned interlocutory application namely I.A.No.16124 of 2017 seeking for dismissal of the suit O.S.No.12140 of 1996 on the ground that the same has been abated as against the 1st defendant.

13.They would submit that since no steps have been taken to implead the legal heirs of the 1st defendant who had died on 14.06.2002 within a prescribed time, the suit had to be dismissed as abated. The petitioners would contend that the suit could not be proceeded with as per the provisions of Section 5 read with

Article 120 and 121 of the Limitation Act.

14.The respondents 1 to 4 had filed a detailed counter wherein they relied upon the Judgments of the Honourable Supreme Court. They would contend that the suit has not been abated as the 1st defendant had died subsequent to the passing of the preliminary decree and before the filing of the application in final decree the petitioners having been brought on record in the final decree proceedings, therefore there was no question of the suit having abated as against the deceased 1st defendant. It is pertinent to mention that the petition I.A.No.11663 of 2016 to condone the delay of 6589 days is yet to be ordered.

15.The learned VII Assistant Judge by her order dated 12.11.2018 proceeded to dismiss the said application. The learned Judge after perusing the records held that the petitioners herein had entered appearance through their counsel and had been set ex parte for not having filed their counter and therefore

the contention that they came to know about the passing of the preliminary decree only on 15.09.2016 was totally false.

16.Challenging the said order the revision petitioners are before this Court. Heard the arguments of both counsels. It is seen from the records that the revision petitioners were aware about the ex parte decree even in the year 2010 since they had participated in the Advocate Commissioners proceedings on 27.03.2010. A cursory look at the signature in the notes of proceedings with the signature of the 2nd petitioner in the affidavit would clearly show that they have participated in the proceedings of the Advocate commissioner on 27.03.2010 and thereafter kept quite and only on 15.09.2016 when the plaintiffs were taking steps to bring the property to sale that they deemed it fit to enter appearance before the Court on allegation that the 2nd petitioner had not engaged services of the Advocate K.Ramamoorthy and they were not aware of the proceeding.

17.The fact that in the notice issued to Ramamoorthy the petitioners have not accused him of appearing on their behalf without authority but only seeking his consent for changing the counsel and for returning the papers it is clearly evident that the petitioners, particularly 2nd petitioner had acknowledged the services of the said Ramamoorthy even on 26.11.2009 when the affidavit was filed on behalf of the 2nd respondent by the said Ramamoorthy in the present petition. The petitioners are seeking the dismissal of the suit as abated on the ground that the legal heirs of the deceased 1st defendant have not been brought on record within the time stipulated in Section 5 read with Article 120, 121 of the Limitation Act.

18.The counsel for the respondent had relied on the Judgement in ***Perumal Pillai Vs. Perumal Chetty and others*** reported in ***AIR 1928 Mad 914*** wherein the Full Bench was called upon to give its answer as to whether the death of a person after the preliminary decree and before filing the final

decree would result in the suit being abated. The Full Bench had answered the reference by stating that the preliminary decree determines the right of the parties and final decree was only giving effect to the right and therefore there was no question of there being an abatement.

19.The Honourable Supreme Court in the Judgement in ***Ratna Alias Ratnavati (SMT) Vs. Syndicate Bank and others*** reported in ***(1995) 1 SCC 407*** has also confirmed the above position and has held that there was no need to make application within a period of limitation as provided under Article 120 and 121 of the Limitation Act.

20.In the light of the above, I am of the considered view that the order of the learned VII Assistant City Civil Judge, Chennai does not suffer from any infirmity and the Civil Revision Petition is liable to be dismissed. The action of the petitioners is nothing but an abuse of process of Court since they had

knowledge of the suit as early as in the year 2010 at least from when the Advocate Commissioner had visited the property but they had not taken any steps whatsoever to set aside the ex parte decree in the suit O.S.No.12140 of 2006. Without doing so they are attempting to somehow scuttle the decree holder's right to enjoy the fruits of the decree by moving one petition after the other.

In the above circumstances the Civil Revision Petition stand dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

20.02.2019

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Index : Yes/No
Speaking order/non-speaking order

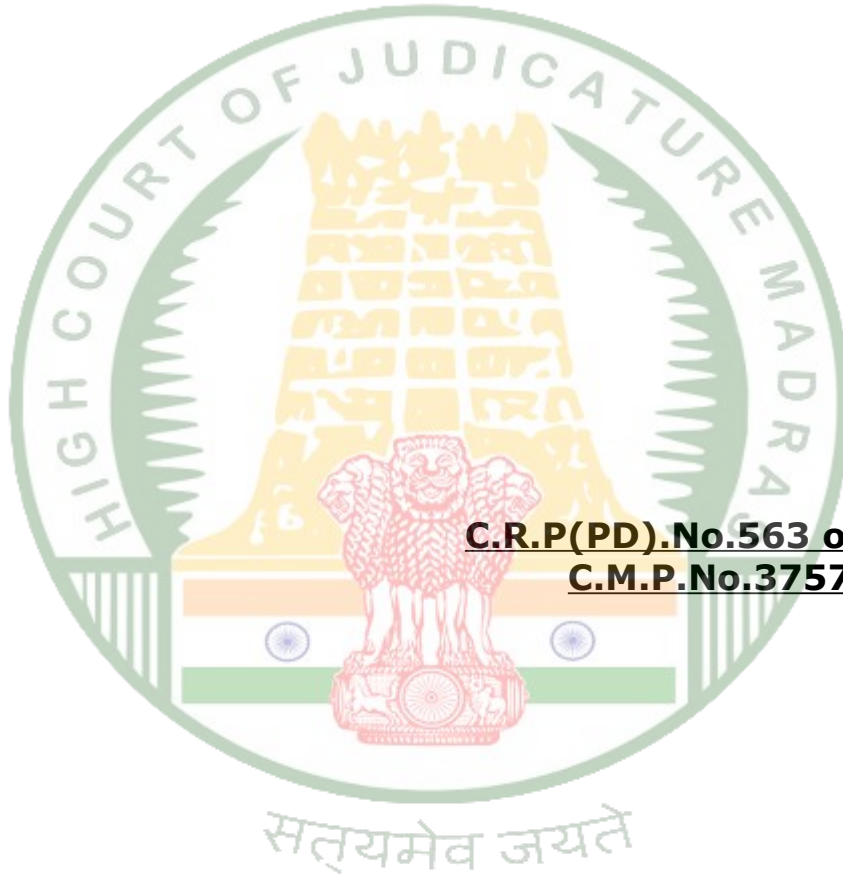
To,

The VII Assistant City Civil Judge,
Chennai

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P.T.ASHA, J.,

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