

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2019

CORAM

THE HONOURABLE MR. JUSTICE N.SATHISHKUMAR

C.R.P.(P.D).No.4964 of 2011

and

M.P.No.1 of 2011

C.James

.... Petitioner

Vs

1. Smt.Selvi

2. Smt.Lalitha

.... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the order dated 10.10.2011 made in I.A.No.508 of 2011 in O.S.No.79 of 2007 on the file of the Principal Sub Ordinate Judge, Salem.

For Petitioner : Mr.T.R.Sundaram

For Respondents : Mr.D.Shivakumaran

ORDER

This Civil Revision Petition has been filed as against the order of the dismissal of the Trial Court in condoning the delay of 1343 days in filing the petition under Order 9 Rule 13 to set aside the exparte preliminary degree passed against the defendant in O.S.No.79 of 2007.

2. The main allegation of the petitioner is that after passing the exparte decree, he came to salem to attend the funeral ceremony and only then, he came to know that the exparte decree was passed against him. He would further submit that he was residing in Erode for the past five years and summons have not been served which caused the delay of 1343 days in filing this application. This application has been opposed by the respondents on the ground that the petitioner is residing only at Salem and has filed false affidavit. Hence, the Trial Court has dismissed the application to condone the delay of 1343 days against which the present revision has been filed.

3. Heard the learned counsel for the revision petitioner. According to him, admittedly, he is not residing in Salem and at the time of passing of exparte decree, he was residing in Erode and further submitted that the summons have not been duly served on him. The learned Counsel for the revision petitioner further contended that the Trial Court has not taken into consideration of the above facts whereas, the learned Counsel appearing for the respondents submitted that the affidavit is not bonafide in nature and the delay cannot be condoned.

4. I have perused the materials on records. The Trial Court itself clearly found that on three occasions, summons sent have not been served on the revision petitioner. Only the intimation alone is given and thereafter, publication has been effected. When the petitioner/defendant submitted that he was not residing at that particular time in Salem and the summons have not been served lawfully and mere intimation alone was given, the Trial Court ought to have given an opportunity to the revision petitioner to contest the issue on merits. Only summons as per Order V Rule 2 of the Code of Civil Procedure is served, it would contemplate a proper service of summons. Whereas, admittedly, in the instant case, no summons have been served under the said procedure. Therefore, in order to give a fair opportunity, the Trial Court ought to have condoned the delay in filing the application to set aside the exparte decree. Though the suit is for mere partition, it is the contention of the revision petitioner that an opportunity should be given to him to participate in the Trial.

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5. Hence, I am of the view that the Trial Court in dismissing the application on the ground that there is no sufficient term shown in the

affidavit, is not correct. The context of service of summons stands as a sufficient cause in this revision and when the Court itself has indicated that the summons have not been received and finally, the publication has been effected, the Court ought to have approached this matter liberally and pragmatically whereas, the Court dismissed the application.

6.Hence, the orders passed by the Trial Court in the application to condone the delay is set aside and the exparte decree also set aside. The Trial Court is directed to dispose of the suit within a period of six months from the date of receipt of copy of this order. Consequently, the connected miscellaneous petition is closed. No costs.

11.03.2019

vji

Index: Yes/No
Speaking Order/
Non-speaking order

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To

The Principal Sub Ordinate Judge,
Salem.



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N.SATHISHKUMAR,J.

vji



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