

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on : 08.11.2019

Orders Pronounced on : 13.11.2019

CORAM

THE HON'BLE MR. JUSTICE **R.PONGIAPPAN**

CRP.NPD.No.1546 of 2013
and M.P.No.1 of 2013

1.Sulochana Ammal
2.N.Kali(deceased)
by his L.Rs
3.K.Nagaraj
4.K.Partheepan
5.Jayanthi

..Petitioners

Vs.

K.Ravindranath

..Respondent

PRAYER:

The Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure to set aside the fair and decretal order dated 30.01.2013 passed in I.A.No.2310 of 2012 in O.S.No.4623 of 2004 on the file of the learned XI Assistant City Civil Court, Chennai.

For Petitioners : Mr.G.Ramadurai

For Respondent : M/s.K.Kalpana
for Mr.R.Vijaya Raghavan

ORDER:

The plaintiffs in O.S.No.4623 of 2004 on the file of the XI Assistant City Civil Court, Chennai are the revision petitioners. On 01.08.2004 they filed a suit in O.S.No.4623 of 2004 as against the respondent herein and seeks the following reliefs:

(i) to redeem the mortgaged schedule mentioned property mortgaged on 21.09.1992

(ii) granting a mandatory injunction, directing the defendant to handover the original title deed dated 12.04.1989 along with all related documents including the mortgage deed dated 21.09.1992 to the plaintiffs

(iii) granting a mandatory injunction, directing the defendant to execute a registered acknowledgment in favour of plaintiffs to redeem the mortgage.

(iv) directing the defendants to pay costs of this suit.

2.The respondent herein as a defendant entered into appearance and filed his written statement on 16.02.2005. Though the respondent filed his written statement in the year of 2005, for the reason best known to the parties the trial court proceedings has not

been completed till 2009. In the said circumstances on 10.09.2009 the learned IV Assistant City Civil Judge, Chennai decided the suit as exparte and after examining one of the plaintiffs as PW1, preliminary exparte decree has been passed in favour of the plaintiffs. Thereafter on 06.02.2012, the respondent filed an application in I.A.No.2311 of 2012 and prayed to set aside the exparte preliminary decree. The learned XI Assistant Judge, Chennai after receiving the common counter filed by the petitioners on 23.02.2012 by order dated 30.01.2013 allowed the application filed by the respondent and condoned the delay of 849 days in filing the application to set aside the exparte decree passed in O.S.No.4623 of 2004. Aggrieved over the same, the petitioners are before this Court with the present Civil Revision Petition and prayed to set aside the order dated 30.01.2013 in which the exparte decree has been set aside.

3.The learned counsel appearing for the petitioners would contend that after passing a preliminary decree, the petitioners in the month of December 2010 filed a petition in I.A.No.4362 of 2010 to pass a final decree. In the said application, the respondent appeared and filed his counter in which in paragraph 3 he has mentioned about the passing of preliminary decree. Accordingly even after knowing the passing of preliminary decree in the month of November 2011, he has

kept quiet till 06.02.2012 and only on the said date he has filed application in I.A.No.2311 of 2012 to set aside the ex parte preliminary decree. In fact, nobody prevented the respondent to file an application immediately after knowing the details of passing exparte decree against him. Accordingly, he prayed to allow the Civil Revision Petition.

4.On the other hand, the learned counsel appearing for the respondent would contend that for allowing this type of application the person who wants to condone the delay has to project sufficient cause, that too the the said reasons are bonafide one. But in this case, the respondent rightly projected the sufficient cause as after passing exparte preliminary decree, he fell in ill on 10.09.2009 and further due to his younger son's marriage, he was unable to contact his counsel and also unable to proceed further in the matter. Only during the first week of October 2009, the petitioner was able to contact the counsel over phone who informed him that the matter has been decided against him as there was no appearance on 10.09.2009. It is the further submission of the respondent that due to the petitioner's son's marriage and also due to the petitioner's absence in India, he was unable to meet the counsel. So the reasons projected by the respondent / petitioner before the trial court is bonafide one.

5.Submissions made by the counsels appearing on either side are considered.

6.As per the entries made in the impugned order, the respondent herein filed application to set aside the exparte decree only on 06.02.2012. Though the said application has been filed in the year 2012, he has made averments in the petition filed before the trial court, as he contacted his counsel in the month of October 2009. So if the said averment is true one, it is necessary for him to file a petition to set aside the exparte decree immediately in the month of October 2009 itself. But he has not filed an application till 06.02.2012.

7.In this aspect it is further averred on the side of the petitioner that after passing exparte preliminary decree on 10.09.2009, immediately within three months on 15.12.2009 the petitioners sent a legal notice to the respondents\ in respect to the passing of preliminary decree, which was received by the respondent. Further in the month of December 2010 the petitioners herein filed I.A.No.4361 of 2010 to call for the records in O.S.No.1206 of 1998 which is also relevant to the dispute now having by the petitioners and the respondent. Further on 01.12.2010 itself, the petitioner filed

application in I.A.No.4362 of 2010 to pass a final decree, for which in the month of November 2011, the respondent / petitioner filed a common counter. In the common counter filed by the respondent he has admitted that the exparte preliminary decree has already been passed against him. Even after knowing the same, till February 2012, he has not filed any application to set aside the exparte decree. The said circumstances reveals the fact that even after constantly watching the entire proceedings initiated by the petitioners, he has kept quiet till the month of February 2012 and only thereafter he filed an application to set aside the exparte. The said circumstances shows he has not filed application with bonafide reasons.

8.Further in order to prove the reasons that he is in abroad for the period of three years, he has not produced a passport, which is a necessary document to prove the said averment. If really, the respondent / petitioner is in abroad for a period of three years, it is not possible for him to file a common counter in November 2011 in an application filed for passing final decree. So we cannot come to the conclusion that the respondent / petitioner has projected his case before the trial court with sufficient cause. So the petition filed by the respondent / petitioner before the trial is without any justifiable reasons. Further it is clear abuse of process of court. Having

appeared and filed counter in a final decree proceedings, after one year filing an application to set aside the exparte preliminary decree is not appreciable. Though the relief of condoning the delay is discretionary one, it must be given to the person who is having care and vigil. Before conclusion, this Court would like to say that the maxim *Vigilantibus non dormientibus jura subveniunt*(law assists) those who are vigilant and not those who sleep over their rights aptly applies to the case on hand.

9.In the light of the above observations, this Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

13.11.2019

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No
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R.PONGIAPPAN,J.

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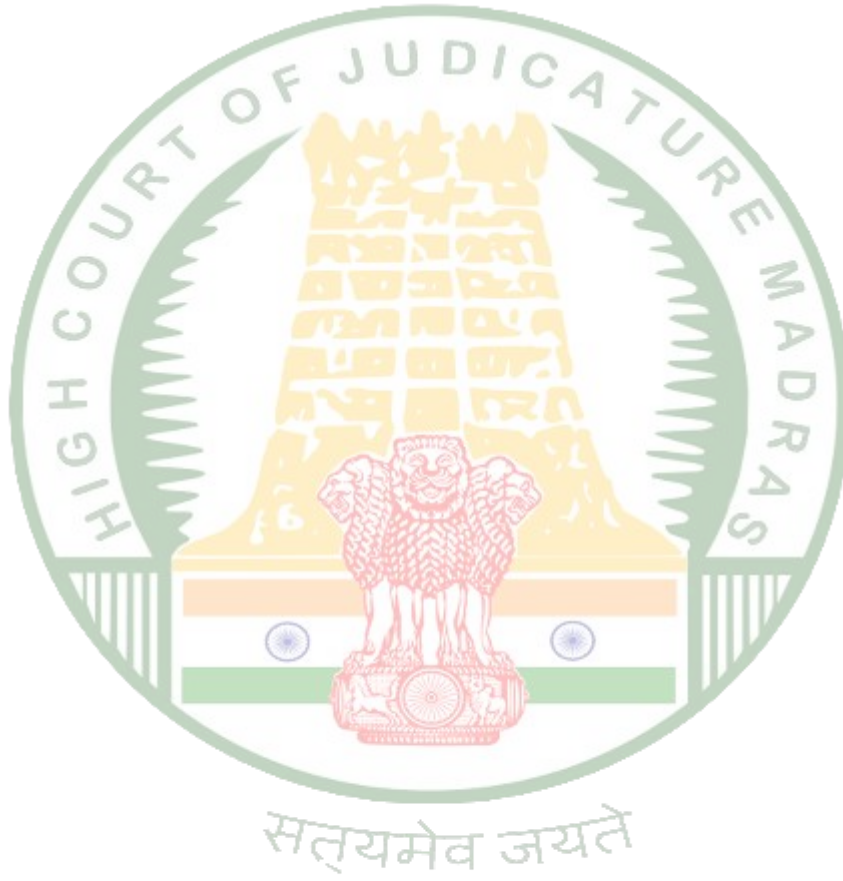
To
The learned XI Assistant City Civil Court,
Chennai.



Pre Delivery order made in
CRP.NPD.No.1546 of 2013
and M.P.No.1 of 2013

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