

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.02.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.R.P.(NPD)No.2507 of 2013
and M.P.No.1 of 2013

P.Kumarasamy .. Petitioner

versus

1.S.Kandasamy
2.S.Gurusamy .. Respondents

PRAYER: Civil Revision Petition has been filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 06.02.2013 made in I.A.No.489 of 2011 in O.S.No.360 of 1998 on the file of the learned Additional District Munsif, Tiruchengode.

For Petitioner : Mr.N.Manokaran

For Respondents : Mr.P.Valliappan

ORDER

This Civil Revision Petition has been filed against the order dated 06.02.2013 made in I.A.No.489 of 2011 in O.S.No.360 of 1998 on the file of the learned Additional District Munsif, Tiruchengode.

2. The brief facts leading to the Revision are as follows:

2.1. The plaintiffs have filed a suit for declaration and cancellation of sale deed executed by the second defendant in favour of the first defendant in respect of the half share in the common well *inter alia* contending that the sale deed is not binding on the property, which is an ancestral property.

2.2. In the above suit, the first defendant engaged an advocate, namely, P.Srinivasan and filed a written statement. It is to be noted that the suit is of the year 1998. It is the case of the revision petitioner that after filing of the written statement, his counsel has informed that he will inform the further proceedings of the case. When the matter stood thus, on 22.02.2003, his counsel met with a road accident and succumbed the injuries. On hearing the death of his counsel, he rushed to the Office of the counsel and enquired his clerk about the position of the present suit. However, he shown ignorance of any case pending at Tiruchengode and he could not give any suit number. Therefore, he was under the impression that the suit would be pending.

2.3. The another suit filed in O.S.No.537 of 2004 between the revision petitioner and the plaintiffs and others is also pending before the

District Munsif Court, Tiruchengode for relief of partition and some other properties. In the said suit, when P.W.1 was examined on 22.06.2010, at the time he came to know that the suit filed by the revision petitioner was decreed *ex parte* in the year 2003 itself. Again, he rushed to his previous counsel Srinivasan Clerk Somasundaram giving the particulars of the suit and thereafter, on search, he could trace the suit bundle and handed over the same to the revision petitioner on 08.07.2010. Therefore, there is a delay of 2368 days in filing the application to set aside the *ex parte* decree.

2.4. The above application has been objected by the respondents. In the above application, the revision petitioner was examined as P.W.1 and also examined P.W.2 said to be the Clerk of his previous counsel and the document was exhibited as P.1. On the side of the respondents and 4 exhibits were marked as Ex.R.1 to Ex.R.4. Based on the materials and evidence, the Court below dismissed the application on the ground that there was no *bona fide* reason and the delay is not properly explained. Aggrieved over the same, the present revision has been filed.

3. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents.

4. The learned counsel appearing for the revision petitioner submitted that the death of the petitioner's counsel is not in dispute and the revision petitioner has clearly pleaded the circumstances leading to such huge delay. The Court below has not appreciated his pleadings in the affidavit as well as the evidence and P.W.2 Advocate clerk has also clearly supported the version of the revision petitioner. When the death of the counsel has been clearly established and the revision petitioner has not informed the proceedings of the suit, the substantial right cannot be shut in the application stage itself. The trial court ought to have taken liberal approach in exercising its discretion in favour of the revision petitioner. Hence, he prayed for allowing the revision.

5. The learned counsel appearing for the respondents would contend that the application filed to condone the delay cannot be maintained, the revision petitioner has not come to the Court with *bona fide* reason and he has not approached with true facts before the Court, six months prior to the *ex parte* decree, he has already sold the property to third parties. It is the further contention that he is not a rustic villager and he is a graduate and he has also prosecuting another suit in the same Court till 2003. Therefore, it is

highly improbable to condone that till 2010, he was not informed about the present suit. Hence, the trial Court after analysing the entire aspects thoroughly, dismissed the application holding that there is no sufficient cause.

6. I have perused the entire materials available on record and considered the submissions made by both counsels.

7. The suit has been originally laid by the respondents for declaration seeking to annul the sale deed said to have been executed by the second defendant in the suit in respect of the half share in the common well on the ground that the properties are ancestral properties and the sale deed is a fraud and forgery one. It is not in dispute that the revision petitioner has entered appearance through an advocate Srinivasan and filed a written statement in the above suit. It is also not in dispute that the said counsel Srinivasan has died in the year 2003 in a road accident.

8. The main contention of the revision petitioner is that after the death of his counsel, when he met P.W.2, the Clerk of the said counsel, P.W.2 could not locate the bundle and shown his ignorance. Therefore, he was under the impression that the suit would be pending. When the matter stood thus, in

a connected suit in O.S.No.537 of 2004 filed for partition and other reliefs in respect of the same subject matter, at the time P.W.1 was examined in the year 2010 i.e. on 22.06.2010 the revision petitioner came to know about the *ex parte* decree passed against him in the year 2003 itself. Thereafter, he had approached P.W.2 and got the case bundle traced and filed an application.

9. No doubt, when the litigants are rustic villagers, who have no idea about the Court proceedings then the submission of the revision petitioner can be very well founded whereas, in this case the revision petitioner is not a rustic villager and he is a decree holder. Besides there were other proceedings pending in respect of the same suit property in O.S.No.537 of 2004, which is also pending from the year 2004, P.W.1 evidence clearly indicate that he is regularly appearing in the above case before the concerned Court. Therefore, it is highly improbable to contend that till 2010, he has not followed the other suit, which was filed to set aside the document in favour of the revision petitioner, pending before the same Court.

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10. It is normal conduct of any person, against whom, the suit is filed to deny the substantial right acquired on the basis of the document to follow such suits to protect his interest. Therefore, the contention of the

revision petitioner that he was not aware of *ex parte* decree till 2010 cannot be countenanced and its against the normal human conduct. It is further to be noted that the revision petitioner has already filed a suit for permanent injunction in respect of the same property in O.S.No.282 of 1998, it appears that the above suit is also dismissed and no appeal whatsoever filed. When there were 3 suits pending at the relevant point of time in respect of the same suit property, it is normal conduct of any human being, particularly when the rights can be affected to follow such suits. Therefore, the contention of the revision petitioner that he could not get the suit number through P.W.2 said to be the Clerk of the erstwhile counsel, is highly improbable.

11. It is further to be noted that the revision petitioner has sold the suit property even much prior to the *ex parte* decree came to be passed. This fact has been established during his cross examination. The above facts is also not disclosed in the application filed to set aside the *ex parte* decree. That apart, filing of another suit for bare injunction is also not found in the affidavit. All these facts would clearly indicate that the revision petitioner has not come to this Court with clean hands and on the other hand, he has approached the Court by suppressing materials facts with regard to the suit property.

12. No doubt, the Court has to adopt the pragmatic approach while exercising its discretion to condone the delay, which occurred due to somebodies mistake not at parties mistake. To take such pragmatic or to liberal approach, the reasons assigned in the application must be true and without any *mala fide*, otherwise the reasons must be a *bona fide* one. When the application and the conduct indicated that the reasons are not *bona fide* whatever may be the length of the delay whether it will be huge or even a small, the Court cannot exercise its discretion to condone such delay. The trial Court has considered the evidence in entirety and dismissed the application to condone the delay of 2368 days. On analysing the entire aspects, I do not find any infirmity or illegality in the order passed by the trial Court.

13. With these observations, the Civil Revision Petition is dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

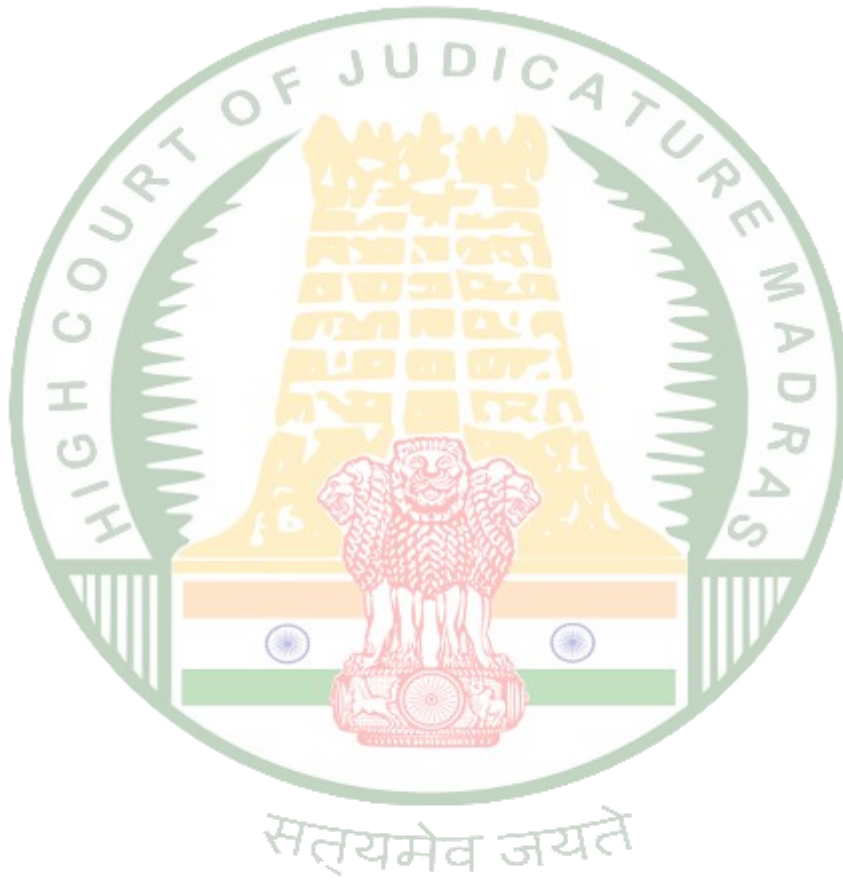
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Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes

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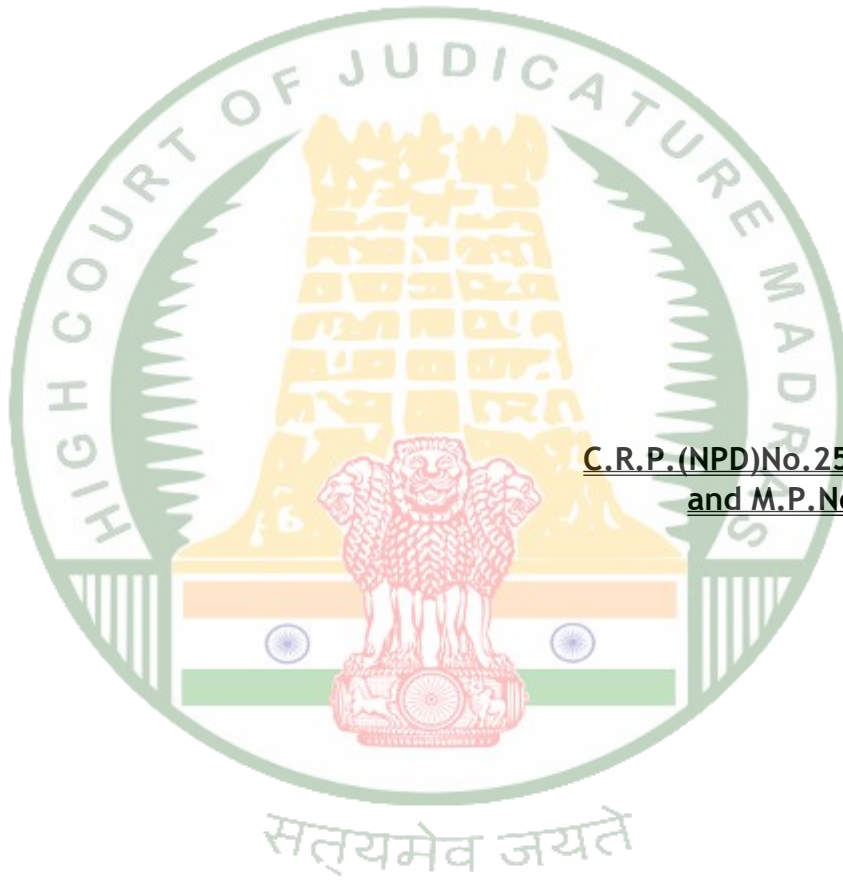
To

The Additional District Munsif,
Tiruchengode.



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