

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 01.07.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

CRP (NPD) No.2803 of 2013 and
M.P.No.1 of 2013

V.Appandairaj ... Petitioner

Vs.

1. V.Vishabadas (deceased)
2. N.C.Mani
3. V.Jayanthi
4. Anitha
5. V.Ajithkumar alias Gowtham
6. V.Dinesh Kumar

(Respondents 3 to 6 are brought on record as LR's of the deceased R1 vide order of this court dated 28.03.2019 made in CMP No.4208/2019 in CRP No.2803 of 2013)

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the orders dated 07.06.2011 passed in I.A.No.185 of 2009 in O.S.No.7 of 2007 by the Principal Subordinate Judge, Thiruvannamalai.

For Petitioner : Mr.M.Ramalingam

For Respondents : Mr.K.Sathiskumar (for R2)

Mr.A.K.Rajaraman (for R3 to R5)

ORDER

The civil revision petitioner is the first defendant in O.S.No.7 of 2007 on the file of the Principal Subordinate Judge, Thiruvannamalai. The first respondent (since deceased) filed the above suit against the civil revision petitioner and the 2nd respondent for partition of the suit properties into two equal shares and to allot one such share to him. The present revision petitioner remained absent in the suit and therefore, he was set exparte. The suit was decreed by the Principal Subordinate Judge, Thiruvannamalai, after full contest by the 2nd respondent herein and a preliminary decree for partition was passed on 08.07.2008. The Principal Subordinate Judge allotted first item of the suit property to the 2nd defendant and the second item of the suit property to the plaintiff in O.S.No.7 of 2007. Subsequently, the civil revision petitioner/ first defendant filed a petition under Order IX Rule 13 of the Code of Civil Procedure along with a petition in I.A.No.185 of 2009 under Section 5 of the Limitation Act to condone the delay of 361 days in filing the petition to set aside the decree. The learned Principal Subordinate Judge, Thiruvannamalai, after full contest dismissed the petition in I.A.No.185 of 2009 vide her orders dated 07.06.2011. Aggrieved over the same, the civil revision petition is filed by the first defendant in O.S.No.7 of 2007.

2. Mr.M.Ramalingam, learned counsel appearing for the revision petitioner would contend that the revision petitioner was not served with suit summons and that the revision petitioner was not residing in the address mentioned in the plaint during the year 2006. He would further contend that the revision petitioner came to know about the decree passed against him only during the second week of July 2008. It is also contended by him that the revision petitioner was indisposed and could not attend the court to contest the suit in O.S.No.7 of 2007. According to him, when the revision petitioner had explained the delay in filing the petition to set aside the exparte decree passed against him, the learned Principal Subordinate Judge, Thiruvannamalai did not consider the same and dismissed the application filed by the revision petitioner in I.A.No.185 of 2009. He therefore, prayed for allowing the present revision petition.

3. Per contra, the learned counsels appearing for the respondents raised the following points.

i) In the suit in O.S.No.7 of 2007, two items were shown as suit properties.

ii) In the preliminary decree, the first item of the suit property was allotted to the share of the second defendant, who obtained a sale certificate in the court

auction sale in E.P.No.22 of 2000 on the file of the Principal Subordinate Judge, Thiruvannamalai filed against the civil revision petitioner.

iii) The 2nd item of the suit property was allotted to the share of the plaintiff.

iv) The civil revision petitioner received summons on 18.04.2007 in O.S.No.7 of 2007, as evidenced by the postal acknowledgment card Ex.C1 and therefore, it is false to contend that he did not receive summons in the suit in O.S.No.7 of 2007.

v) The civil revision petitioner further admitted that the address mentioned in Ex.C1 was his address and he was residing in that address during the relevant period.

vi) The civil revision petitioner has not explained the delay of 361 days in filing a petition to set aside the exparte decree passed against him

vii) The suit in O.S.No.7 of 2007 was decreed on merits and therefore, it is not an exparte decree.

The learned counsels appearing for the respondents also relied on the decision in ***H.Dohil Constructions C. (P) Limited V. Nahar Exports Ltd.***

reported in 2015(1) SCC (Civil) 646 and contended that the courts are required to weigh the scale of balance of justice in respect of both the parties and the said principle cannot be given a go by under the guise of liberal approach.

4. The first respondent V.Vishabadas filed the suit in O.S.No.7 of 2007 before the Principal Subordinate Judge, Thiruvannamalai for partition of the suit properties. The first defendant/ present revision petitioner remained absent throughout the proceedings in O.S.No.7 of 2007 and therefore, he was set exparte. The 2nd defendant purchased the first item of the suit property in the court auction sale on 07.08.2001 and he also took delivery of the first item of the suit property in E.P.No.22 of 2000 on the file of the District Munsif, Thiruvannamalai. The delivery was also recorded by the court on 30.06.2003. The first item of the suit property was brought for sale in court auction for realisation of amounts from the civil revision petitioner/1st defendant, as per the decree passed in O.S.No.65 of 1996 on the file of the District Munsif, Thiruvannamalai. It is also seen from the records that the sale was not challenged either by the revision petitioner or by the first respondent (the plaintiff in O.S.No.7 of 2007). The learned Principal Subordinate Judge, Thiruvannamalai, after considering the rival submissions of the plaintiff and the 2nd defendant in

O.S.No.7 of 2007, decreed the suit and allotted the first item of the suit property in favour of the 2nd defendant and second item to the plaintiff.

5. The civil revision petitioner in his affidavit filed along with the petition in I.A.No.185 of 2009 had contended that he was not served with summons in O.S.No.7 of 2007 and that he was not residing in the address mentioned in the suit. However, Ex.C1 clearly shows that summons were served on him on 18.04.2007 and the revision petitioner received the same. In fact the revision petitioner admitted that the address found in Ex.C1 is his address. Therefore, the contention of the revision petitioner that he did not receive the summons in the suit cannot be accepted. Further more the preliminary decree passed in O.S.No.7 of 2007 is not an exparte decree and after full contest by the 2nd defendant, the suit was decreed. The revision petitioner/1st defendant did not file any appeal against the decree and judgment passed by the Principal Subordinate Judge, Thiruvannamalai in O.S.No.7 of 2007. Though the civil revision petitioner filed a petition under Order IX Rule 13 of the Code of Civil Procedure to set aside the exparte decree passed against him along with a petition in I.A.No.185 of 2009 in O.S.No.7 of 2007, under Section 5 of the Limitation Act to condone the delay of 361 days in filing the set aside petition, he did not explain the delay to the satisfaction of court. It is clear from Ex.C1

that the revision petitioner was aware of the proceedings in O.S.No.7 of 2007 and the reason for his non appearance should be supported by convincing evidence and concrete materials, which are not available in the present case. In fact, the reasons assigned in the affidavit are found to be false and therefore, the Principal Subordinate Judge, Thiruvannamalai had rightly dismissed the petition filed by the revision petitioner. It is settled law that in a petition filed under Section 5 of the Limitation Act, each and every day delay should be explained by the petitioner. As already observed, the orders passed by the Principal Subordinate Judge, Thiruvannamalai is not also an ex parte decree and it was passed after full contest by the 2nd defendant. Hence, I do not see any reason to interfere with the findings recorded by the learned Principal Subordinate Judge, Thiruvannamalai.

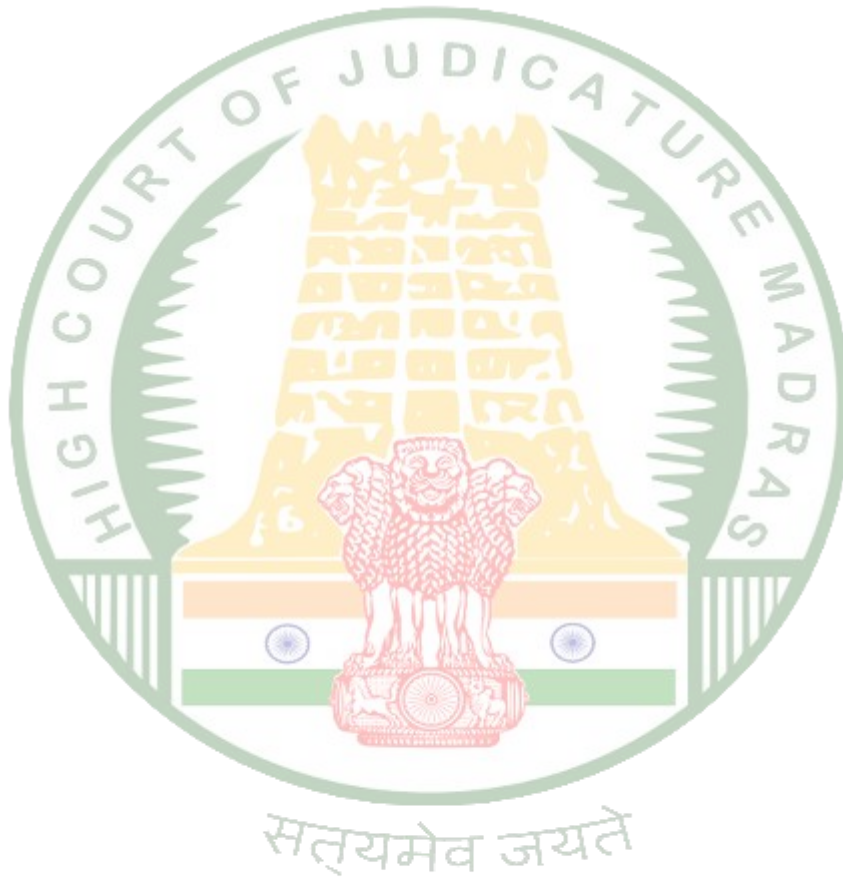
6. In the result, the civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed. The orders passed in I.A.No.185 of 2009 in O.S.No.7 of 2007 by the Principal Subordinate Judge, Thiruvannamalai is upheld.

01.07.2019

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

The Principal Subordinate Judge, Thiruvannamalai.



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R.HEMALATHA,J.
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