

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.09.2019

CORAM:

THE HONOURABLE MR. JUSTICE **R.PONGIAPPAN**

C.R.P.NPD.No.3760 of 2016
& C.M.P.No.19111 of 2016

S.P.Manickam

.... Petitioner

Vs

1. Dhanam
2. Amaravathi
3. Chinnammal
4. Poonkodi

.... Respondents

PRAYER: Civil Revision Petition is filed under Section 115 of C.P.C., to set aside the fair and decretal order dated 16.09.2016 in I.A.No.59 of 2014 in A.S.No.165 of 2006 passed by the learned Sub Judge, Namakkal.

For Petitioner : Mr.M.Velmurugan
For Mr.Venkatesh Mohanraj

For Respondents
For R1 & R2 : Mr.S.R.Varu Karthik
For Mr.C.Jagadish
For R3 & 4 : No appearance

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ORDER

The instant Civil Revision Petition has been filed as against the order dated 16.09.2016 passed in I.A.No.59 of 2014 in A.S.No.165 of 2006, on the file of the learned Sub Judge, Namakkal.

2. Initially, the first and second respondents in this Civil Revision Petition have filed a suit in O.S.No.380 of 2004 on the file the learned Additional District Munsif, Namakkal, as against the petitioner and the respondents 3 & 4 herein and sought for the relief of partition and separate possession. The learned Additional District Munsif, Namakkal, by a judgement and decree dated 29.06.2006, allowed the said suit filed by the respondents 1 & 2 and ultimately granted preliminary decree for partition. Aggrieved over the said judgement and decree, the present revision petitioner has preferred an appeal in A.S.No.165 of 2006, on the file of the learned Subordinate Judge, Namakkal. On 06.04.2010, the said appeal was dismissed by the learned Subordinate Judge, Namakkal, for non prosecution, for the reason that the appellant had not appeared before the said Court.

3. Thereafter, the petitioner herein filed an application to restore the suit, but the same was returned after pointing out some defects. Thereafter, the same has not been re-presented within a time fixed by the Court below. Hence the petitioner filed an application in I.A.No.59 of 2014 to condone the delay of 477 days in re-presenting the said restoration petition. In the affidavit filed in support of that application, the petitioner has stated that on 30.04.2010, the restoration petition filed by the revision petitioner was returned by the Office of the Subordinate Court, Namakkal,

after pointing out some defects. As per the return endorsement, the said petition has to be re-presented before the learned Subordinate Judge, Namakkal on or before 28.05.2010. Unfortunately, since the petitioner was bed-ridden, he was unable to contact his counsel and give the instructions in respect to the defects pointed out by the Office of the said Court. Hence, the delay of 477 days occurred. However, the learned Subordinate Judge, Namakkal, on receipt of that application filed by the petitioner, after affording opportunity to the respondents dismissed the same on 16.09.2016. Aggrieved over the said dismissal order, the petitioner is before this Court with the present Civil Revision Petition.

4. On close scrutiny of the order passed by the learned Subordinate Judge, Namakkal, the learned Judge observed that at the time of filing the restoration petition, the petitioner did not follow the procedure contemplated in the Civil Procedure Code. Further the returned restoration application has not been re-presented within the stipulated time and thereby the relief sought out by the petitioner cannot be granted.

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5. Today when this petition is taken up for hearing both the learned counsels appearing on behalf of the petitioner and the respondents 1 & 2 are present.

6. The learned counsel appearing for the petitioner would contend that it is true that the counsel who appeared on behalf of the petitioner before the trial Court has not followed the procedure contemplated in the Civil Procedure Code. Further he submitted that it is also the fault on the part of the counsel, who filed an application to condone the delay, without enclosing the application for restoring the appeal. According to him, for the fault committed by the Advocate, the party, who is before this Forum, cannot be made to suffer. Further he would contend that since the relief sought for in the appeal is, with respect to the title of the suit property, it has to be decided by way of elaborate arguments. Therefore, he prayed this Court to consider this petition liberally in favour of the petitioner.

7. On the other hand, the learned counsel appearing for the respondents 1 & 2 would contend that in preferring appeal not only Advocates, the parties are also having responsibility to watch the proceedings. In this case, the impugned order clearly states that the counsel who was appearing on behalf of the petitioner himself reported no instructions before the Court below and then only, the condonation application was dismissed. The said findings of the learned Subordinate Judge, Namakkal, clearly show that the petitioner is not having any

interest in proceed with the appeal. According to him, if the Civil Revision Petition is allowed the respondents in this petition are highly prejudice more than that of prejudice caused to the petitioner.

8. The submissions made by the learned counsel on either side are considered.

9. It is true that in the impugned order there was a categorical finding that the appeal was dismissed only for the reason that the learned counsel who appeared on behalf of the petitioner before the Court below had reported no instruction. Further the petitioner did not follow procedures laid down, which are necessary in filing the restoration petition. However, on going through the back ground of the case filed by the respondents 1 & 2, there is no dispute that the suit was filed for the relief of partition. Further the averments made in the plaint clearly disclose the fact that both the petitioner and the respondents in this revision petition are brother and sisters respectively. Though after determining the right of the parties, preliminary decree has been passed by the learned Additional District Munsif, Namakkal, since the appeal is preferred against the said decree, the same has to be decided before passing the final decree.

10. In these circumstances, only to challenge the preliminary decree passed by the learned Additional District Munsif, Namakkal, the petitioner preferred an appeal and the same was dismissed for default. Therefore, the petitioner approached the Court below with the prayer to condone the delay in filing the restoration petition. Since the said petition was dismissed, the petitioner approached this Court with the prayer to direct the Court below to condone the delay in filing the restoration petition.

11. In this occasion, it is necessary to see the judgement of our Hon'ble Apex Court in the case of **Robin Thapa Vs. Rohit Dora** reported in **(2019) 7 SCC 359**, wherein the Hon'ble Apex Court held as follows :-

"Ordinarily litigation is based on adjudication on merits of contentions of parties. Litigation should not be terminated by default, either of plaintiff or defendant. Cause of justice requires that as far as possible, adjudication be done on merits."

12. Applying the said principle laid down by our Hon'ble Apex Court, this Court is of the opinion that since the suit is filed for partition, in respect of the title, an elaborate trial is necessary for better adjudication. Because of the reason that somebody has committed mistake, the petitioner cannot be made to suffer. Therefore, in view of the above stated

reasons, I am inclined to allow this petition. Accordingly, the order dated 16.09.2016 passed in I.A.No.59 of 2014 in A.S.No.165 of 2006 on the file of the Subordinate Court, Namakkal is set aside.

13. Further since the suit is pending from the year 2004, it is appropriate to give directions to the learned Subordinate Judge, Namakkal to dispose the appeal in a time frame manner. Accordingly, the learned Subordinate Judge, Namakkal is directed to take the appeal in A.S.No.165 of 2006 on file and dispose the same as early as possible, preferably within a period of three months from the date of the receipt of a copy of this Order.

14. With the above direction, the Civil Revision Petition is disposed of. Consequently, connected miscellaneous petition is closed. No costs.

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

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23.09.2019

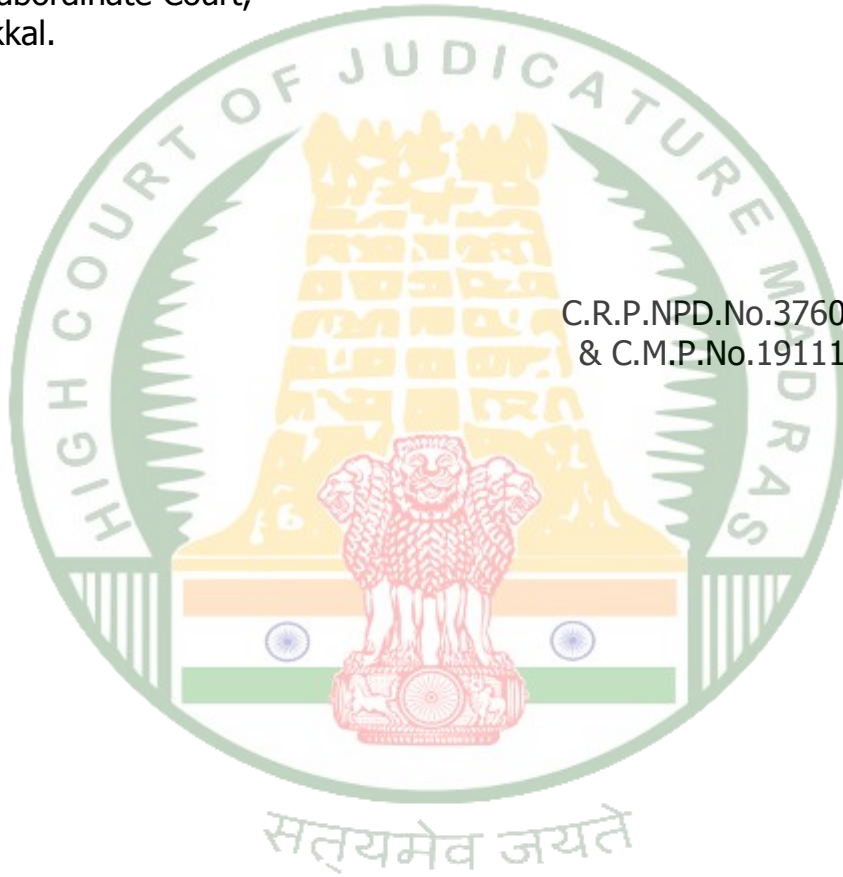
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R.PONGIAPPAN, J.

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To

1. The Subordinate Court,
Namakkal.



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