

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.10.2019

Pronounced on: 05.11.2019

CORAM

THE HONOURABLE THIRU JUSTICE R.PONGIAPPAN

C.R.P.(NPD) No.2366 of 2014

T.Rajendran

.... Petitioner

- Vs -

1. Kamatchi Ammal

2. Komala

3. T.Sivasankaran @ Sankar

.... Respondents

Civil Revision Petition filed under Section 115 of Civil Procedure Code praying to call for the entire records pertaining to the impugned order and decreetal orders dated 29.06.2012 made in I.A.No.157 of 2010 in AS.SR.No.5768 of 2010 on the file of the Subordinate Judge, Tambaram and allow the above said I.A. by allowing this Revision Petition with costs.

For petitioner : Mr.J.Raja Kalifulla
Senior Counsel
for Mr.S.Jaganathan

For respondents : Mr.V.Raghavachari
for Mr.V.R.Appaswamee for RR1 & 2
R3-No Appearance.

ORDER

Aggrieved over the order dated 29.06.2012 passed in IA.No.157 of 2010 in AS.SR.No.5768 of 2010 on the file of the Subordinate Judge, Tambaram, the petitioner, who is the appellant in the above referred appeal, is before this Court with the present Civil Revision Petition.

2. Originally, the respondents 1 and 2 in the Civil Revision Petition filed a suit in OS.No.308 of 2001 as against the revision petitioner and the third respondent and seeks the relief of a partition and separate possession. On 14.09.2009, after full-fledged trial, the learned Additional District Munsif, Alandur, granted a preliminary decree, in which, he observed as plaintiffs 1 and 2 are entitled to $\frac{5}{8}$ th share, the second plaintiff is entitled to $\frac{1}{8}$ th share and the defendants each are entitled to $\frac{1}{8}$ th share in the suit property. Based on the above said preliminary decree, on 23.10.2009 the plaintiffs filed a Final Decree application in I.A.No.2055 of 2009 in OS.No.308 of 2001 on the file of the learned Additional District Munsif, Alandur. On 16.12.2009, the Advocate Commissioner filed a report and thereafter, an exparte Final Decree order was passed on 23.03.2010. Only thereafter, on 05.07.2010, the revision petitioner and the third respondent filed an application in IA.No.870 of 2010 and prays to condone the delay of 76 days in filing the petition to set aside

the exparte Final Decree dated 23.03.2010. In the meanwhile, before filing the said application, on 10.05.2010 itself, the plaintiff filed Execution Petition in EP.No.109 of 2010 and prayed to deliver the possession based on the exparte Final Decree and commission report. Further, on 15.07.2010, before the disposal of IA.No.870 of 2010, which was filed to set aside the exparte decree on 15.07.2010, the first plaintiff has executed a registered settlement deed in favour of the second plaintiff in respect of 5/8th share in the suit property. However, on 06.09.2010, the petition filed to condone the delay in filing the application to set aside the Final Decree was dismissed for default for non payment of batta.

3. On the other hand, in the month of October 2010, the revision petitioner herein filed an application in IA.No.157 of 2010, wherein, he prays to condone the delay of 183 days in filing the petition to set aside the exparte Final Decree passed on 23.03.2010. On 07.09.2011, the said petition was dismissed on the ground that the said application is hit by res-judicata due to dismissal orders passed in earlier IA.No.870 of 2010 on 06.09.2010.

4. Thereafter, in the month of November 2010, the revision petitioner herein filed a suit for declaration under OS.No.896 of 2010 before the learned

Additional District Munsif, Alandur, in which, he prayed to declare the settlement deed dated 15.07.2010 executed by the first plaintiff in favour of the second plaintiff as null and void. Meanwhile, from 24.01.2011 to 11.10.2013 based on the settlement deed dated 15.07.2010, the second plaintiff effected various transfers to third parties while pending suits viz., OS.Nos.896 of 2010 and 668 of 2010 both on the file of the Additional District Munsif Court, Alandur.

5. However, before the encumbrance, the revision petitioner herein filed an appeal in AS.SR.No.5768 of 2010 before the learned Subordinate Judge, Tambaram, along with the said appeal, he filed interlocutory application under Order 41 Rule 3(A) r/w Section 151 of CPC, in which, he prayed to condone the delay of 336 days in filing the appeal against the preliminary decree dated 14.09.2009. The learned Subordinate Judge, Tambaram after affording an opportunity to the respondents/plaintiffs by order dated 29.06.2012 dismissed the said application.

6. Only against the said dismissal order, the appellant/petitioner is before this Court with the present Civil Revision Petition.

7. Today, when the petition is came up for hearing, both the counsels appearing for the petitioner and the respondents are present.

8. It is the contention of the learned counsel for the petitioner that being an illiterate, the petitioner/defendant, believing the words of respondents/plaintiffs kept quiet for sometime without preferring the appeal against the preliminary decree. He would content that it is the duty of the Advocate, who appeared before the trial Court to inform the revision petitioner about the consequences of preliminary decree. In this aspect, he conceded that the revision petitioner as well as the counsel committed a mistake and instead of filing the appeal against the preliminary decree, they entered in appearance in the subsequent proceedings, which is unnecessary. It is the further contention of the counsel appearing for the petitioner that since the dispute is within the family members, it is necessary to determine the right of parties by way of filing an appeal. It is apparent that even after knowing the proceedings are not completed, the second plaintiff entered into sale and received the money, which is hit by Section 52 of Transfer of Property Act. Thereby, the learned Subordinate Judge, Tambaram, without considering the circumstances, in which, the appeal was preferred belatedly, dismissed the application, which is erroneous in law.

9. On the other hand, it is the contention of the respondents that even after selling various items of property to the various persons, after passing the Final Decree preferred an appeal against the preliminary decree is unwarranted. Being the litigant, the petitioner was having the habit of vigil and care, instead of blaming the Advocate, which is not entertainable. According to him, the order passed by the learned Subordinate Judge, Tambaram is within the principles of law. It is the further contention of the respondents that the petitioners/plaintiffs filed an application in IA.No.870 of 2010 to condone the delay to set aside the Final Decree and the same was dismissed for default on 06.09.2010 and this fact has been suppressed in the affidavit filed by the petitioner.

10. Upon considering the arguments advanced by either side, it is not in dispute that filing of the Final Decree application and Execution Petition is within the knowledge of the petitioners. The filing of the application to set aside the exparte application and Final Decree proceedings will go to show that the petitioners are constantly watching the proceedings and there was a straight relationship continued between the petitioners and the respondents. Having remained silent in all the above, now the petitioners are filed an

application to condone the delay in filing the appeal. In this regard, the learned counsel appearing for the petitioner relied on the judgment in the case of **Robin Thapa Vs. Rohit Dora** reported in **[(2019) 7 SCC 359]**, in which, the Hon'ble Apex Court has held as follows:-

"7. Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits."

11. The principle laid down in the above referred judgment is clear that the litigant do not suffer on the principle of default. In this occasion, it is relevant to see the background of the litigation started between the petitioner and the respondents. Before the Trial Court, the case of the first plaintiff is that she purchased the property jointly along with her husband and after the death of her husband, the plaintiffs and defendants are in joint possession of the suit property and the first defendant is entitled to 5/8th share and the defendants are entitled to 1/8th share, and the case of the defendant is that the suit property has been purchased from and out of the income from ancestral property and from the joint contribution of the defendants by carrying out cultivation operation along with their father and the first plaintiff name is only lend in the sale deed as benami. In otherwise, it is not in

dispute that the plaintiffs are the mother and the daughter and the defendants are sons of the first plaintiff/brothers of the second plaintiff.

12. The said circumstances established the fact that the petitioners and the respondents are family members and the property was purchased in the name of the first plaintiff only on 05.04.1954. As per the plaint averments, the first and second defendants are aged about 56 and 50 years at the time of filing the suit in the year 2010. So, it is automatic at the time of purchasing the suit property, they are nearly about 10 and 6 years respectively. In otherwise, since the case of defendants/appellants is that the suit property was purchased from and out of the income from ancestral property, it is necessary for him to establish that their family is having income from the ancestral property. Now on go through the judgment dated 14.09.2009 passed by the learned Additional District Munsif, Alandur, during the time of trial, the defendants have not produced any documents on their side to establish their case. On the other hand on the side of the plaintiff, the documents related to the suit property alone marked as Ex.A1 to A5. It is the well settled principle that the oral evidence against the written document cannot be accepted as a proof. It is evident from the judgment rendered by the learned Additional District Munsif, the petitioner/appellant is kept quiet

without producing any relevant documents to show the income of their family.

13. Though the said factors are not necessary to decide the issue raised in the Civil Revision Petition, because of the reason that already the petitioners are entered in appearance in the Final Decree proceedings and Execution Petition proceedings only to find out the necessity of the appeal, this Court gone into the factual aspects of the suit.

14. In the affidavit filed in support of the petition filed under Order 47 of Civil Procedure Code, which is filed to determine the right of the party. The petitioners have not shown anything in respect of the purchase of the suit property. In this occasion also, the petitioner has not shown any *prima facie* case in respect of the truth that the suit property was purchased from the income from the ancestral property. In the affidavit filed in support of the petition under Order 43 Rule 1A of Civil Procedure Code, it was mentioned by the petitioner that the first plaintiff, who is the mother of the revision petitioner and the second plaintiff, who is the younger sister of the revision petitioner after obtaining the preliminary decree, came for compromise and promised to give a whole suit property with a condition to maintain the first

plaintiff till her death and the second plaintiff waived her share since the first defendant being her elder brother brought up from her childhood and got her married by mortgaging property document in the year of 1974 for giving huge dowry to her. Only by believing the sweet words of the second plaintiff, the revision petitioner has not preferred an appeal against the preliminary decree immediately within the time stipulated. The only reason for condoning the delay attributed by the petitioner is the above mentioned reason.

15. In this regard, if the said averment is true one, it is not necessary for the petitioner for entering into appearance in the Final Decree proceedings. Furthermore, it is also not necessary for them to enter into appearance in the Execution Proceedings. Being the common man, the petitioner become vigil immediately after knowing the details of application filed for passing Final Decree. So only by saying the unbelievable reason, the petitioners are preferred the First Appeal more than that in order to prove the alleged mortgage, the petitioner has not produced the document related in the year 1974 as Exhibited before the Trial Court. At any event, the averments made in the affidavit is not substantiate the documents. Further, since already the Final Decree is passed, preferring the appeal against preliminary decree is unwarranted. It is also not in dispute that the second

defendant executed the sale deed in the name of various persons that too within the knowledge of revision petitioner. In any event, the reason stated by the petitioner to condone the delay is not acceptable one.

16. In view of the above, I am of the opinion that the order dated 29.06.2012 is well considered one and the same does not warrant any interference. Accordingly, this Civil Revision Petition is dismissed. There shall be no order as to costs.

05.11.2019

Index: Yes/no

Speaking/Non-Speaking Order

KMI

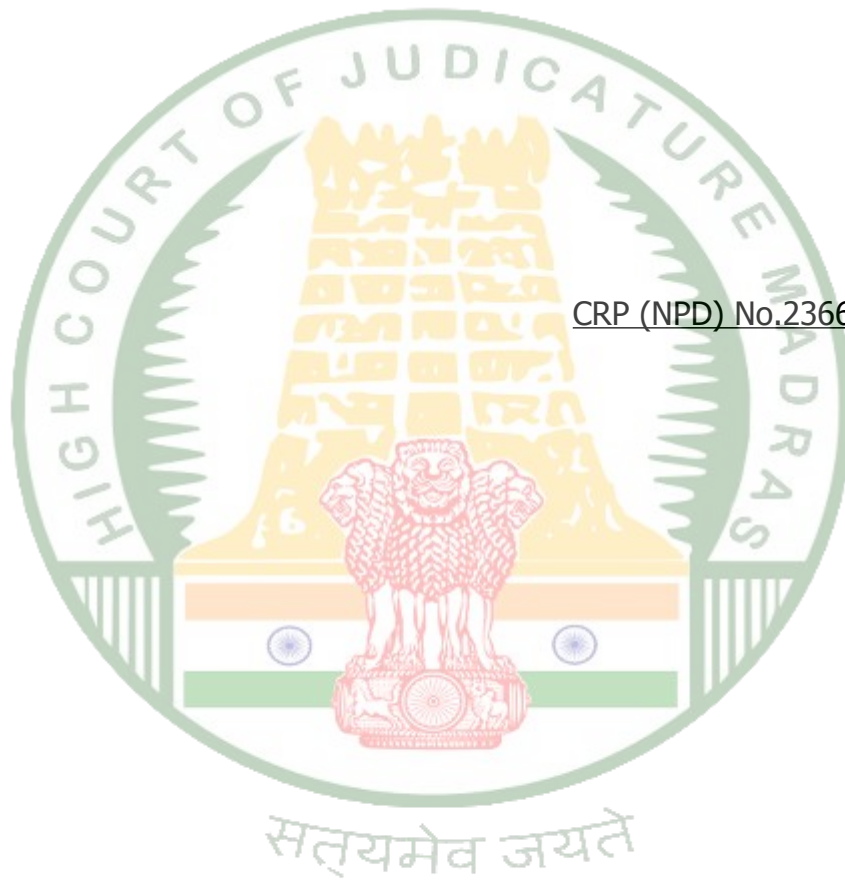
To
The Subordinate Judge,
Tambaram.

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