

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on : 18.09.2019

Orders Pronounced on : 15.10.2019

CORAM

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

CRP.NPD.No.4934 of 2014
and M.P.No.1 of 2014

1.Muthukumar
2.Geetha
3.Rajagopalan Asari

..Petitioners

Vs.

K.Kalavathi

..Respondent

PRAYER:

The Civil Revision Petition is filed under Section 115 of C.P.C. To set aside the order dated 12.06.2014 passed in I.A.No.270 of 2013 in O.S.No.492 of 2000 on the file of the I Additional Subordinate Judge at Salem and allow the above C.R.P.

For Petitioners : Mr.R.Nalliyappan

For Respondent : No Appearance

ORDER:

Aggrieved over the order dated 12.06.2014 passed in I.A.No.270 of 2013 in O.S.No.492 of 2000 on the file of the learned I Additional Subordinate Judge, Salem, the present Civil Revision Petitioners who are defendants in the above referred suit, have filed this Civil Revision Petition and prayed to set aside the order passed in I.A.No.270 of 2013.

2. Originally, the respondent Kalavathi in this Civil Revision Petition as a plaintiff filed a suit in O.S.No.492 of 2000 as against the revision petitioners and seeks relief of partition and separate possession. During the time of trial proceedings, since the revision petitioners not entered into appearance, the learned Additional Sub Judge, Salem passed an order of ex-parte against them and after examining the respondent as witness, he has passed preliminary decree in favour of the respondent.

3. After the decree, the respondent Kalavathi filed an application under Order 26 Rule 12 and 14 before the same court and prayed to pass final decree after divisioning the suit schedule

property in term of preliminary decree. In the said application, the petitioners filed their counter by stating that on 02.11.2012 itself, the plaintiff executed sale deed in favour of the third petitioner. Further they have stated since the suit property has already been disposed by the plaintiff, it is not necessary to appoint Advocate Commissioner for divisioning the property and also there is no necessity for passing final decree.

4.However the learned I Additional Subordinate Judge, Salem appointed the Advocate Commissioner to division the property as per the terms of preliminary decree. Only thereafter the petitioner approached this Court by way of filing this Civil Revision Petition and challenged the validity of the order passed in I.A.No.270 of 2013.

5.Today when the petition is came up for hearing, the learned counsel appearing for the petitioner alone present. There was no representation on the side of the respondent.

6.The petitioners' side counsel would contend that since the property in dispute has already been sold out by the plaintiff

herself, continuing the final decree proceedings is unnecessary and the same is amount to waste of judicial hours.

7.Submissions made by the learned counsel for the petitioner is considered.

8.It is true, if the plaintiff is not having any right in the property under dispute there is no necessity to the court in conducting the final decree proceedings. In this regard in order to decide the issue raised in this Civil Revision Petition, it is necessary to see the details of trial proceedings happened in the trial court before passing the preliminary decree.

9.Before the trial court when the suit is pending for appearance of defendants / petitioners they have not appeared. So, by mentioning the said reason, the learned Subordinate Judge passed an order of ex-parte against them and thereafter ex-parte preliminary decree, has also been passed in favour of the plaintiff. After knowing the above, the petitioners herein are not taking any steps to file a petition for set asiding the ex-parte decree.

10. In this regard the learned counsel appearing for the petitioner made a submission that since the preliminary decree was passed on 20.04.2001, the petitioners are not in a position to show the sufficient cause for condoning the delay occurred in filing the set aside application. He has stated that the petitioners are having only one reason that the property was sold out by the plaintiff on 02.11.2010 itself. In this regard to show his bonafideness, the petitioner has produced the copy of the sale deed executed by the respondent /plaintiff in favour of the third petitioner. Therefore if it is true that the property was already sold in favour of the third petitioner the same is a best reason for condoning the delay in filing the application to set aside the ex-parte preliminary decree. In otherwise, only before the trial court who passed the preliminary decree, the petitioners are entitled to present the petition for set asiding the exparte decree. Therefore, the apprehension made by the learned counsel appearing for the petitioner is unnecessary. In this occasion, it is necessary to see the judgment 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 that *"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."

11. So on following the principles laid down by the Hon'ble Supreme Court, in this case also after selling out the suit property filing an application to pass a final decree by the plaintiff is against the principles of law and the same cannot be entertained. Therefore, I am of the view to direct the petitioners to present the application before the trial court for set aside the ex-parte decree immediately within two weeks from the date of receipt of copy of this order. If such application is filed by the petitioners, the learned Additional District Munsif is directed to consider the same after let in evidence by either side and thereafter dispose of the same in accordance with law. The only remedy available to the petitioner is as above and not otherwise.

12. It is open to the petitioner to file a petition to set aside ex-parte decree within a period of two weeks immediately on receipt of copy of this order. Immediately after receiving the application from the petitioner, the learned I Additional Subordinate Judge, Salem is directed to dispose the same within a period of one month by posting the same in day to day basis.

13.The Civil Revision Petition is disposed of accordingly.
Consequently connected miscellaneous petition is closed. No costs.

15.10.2019

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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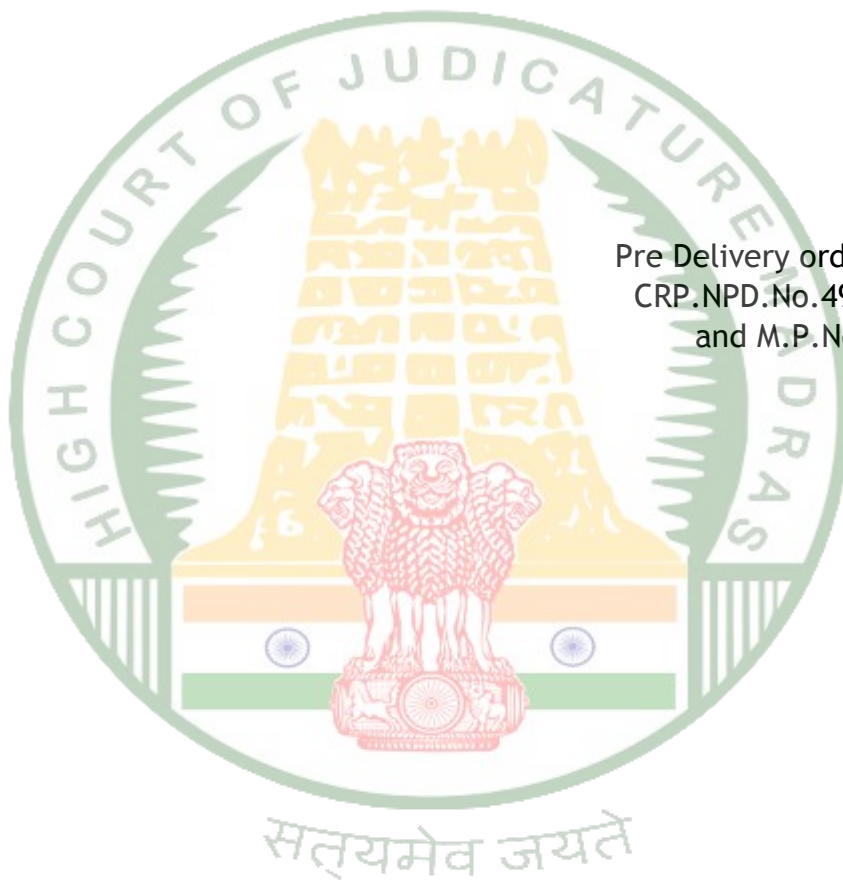
To
The learned I Additional Subordinate Judge
at Salem



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R.PONGIAPPAN,J.

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Pre Delivery order made in
CRP.NPD.No.4934 of 2014
and M.P.No.1 of 2014

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