

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.11.2019

CORAM:

THE HONOURABLE Mr. JUSTICE R. SURESH KUMAR

C.R.P. (NPD) No. 2256 of 2019
and
C.M.P. No. 14685 of 2019

G.T. Mithra

... Petitioner

-Vs-

1. H. Gnanaprakash

2. H. Arunprakash

3. D. Anand

Dasaradhan (Deceased)

4. M. Nagamani @ M. Manigopal

... Respondents

Prayer : Petition filed under Section 115 of the Civil Procedure Code against the decretal order and fair order dated 27.04.2019 passed in I.A. No. 848 of 2017 in O.S. No. 599 of 2008 by the learned Principal District Munsif Court, Alandur.

For Petitioner : Mr. V. Karthikeyan
for Mr. S. Joel

For Respondents : Mr. A. Thiagarajan for R1 and R2
Mr. R. Ashraf Khan for R4

ORDER

This Civil Revision Petition has been filed against the fair and decretal order passed in I.A. No. 848 of 2017 in O.S. No. 599 of 2008 on the file of the learned Principal District Munsif, Alandur, by order dated 27.04.2019.

2. Before the trial Court, the revision petitioner was the fourth defendant along with other defendants, where the first and second respondent / plaintiffs laid the suit for partition. In the said suit, the revision petitioner / fourth defendant seems to have been set exparte and exparte decree also seems to have been passed on 09.09.2016.

3. However, it is the case of the fourth defendant that, on issuance of summons by the Sub-Inspector of Police, Neellangarai, the revision petitioner claimed to have appeared before the said Officer on 13.07.2017 for enquiry, where he was informed by the Police Officer that, the suit has been filed against him in O.S. No. 599 of 2008 which was decreed against him, therefore he agreed for the partition as per the suit decree.

4. According to the revision petitioner, he was shocked on hearing the issue from the Sub-Inspector of Police concerned and thereafter, he had taken steps to verify, whether any exparte order was passed and came to know that, exparte order has been passed against him on 09.09.2016 and in order to set aside the exparte decree, he filed petition, of course with delay of 310 days. In order to condoning the said delay of 310 days in filing the setting aside petition, the fourth defendant / revision petitioner filed the present I.A. No. 848 of 2017 and the said IA having been heard, was rejected by the trial Court, by order dated 27.04.2019, which is impugned herein and aggrieved over the same, the present revision petition has been filed.

5. Heard Mr. V. Karthikeyan, learned counsel for Mr. S. Joel appearing for the revision petitioner, Mr. A. Thiagarajan, learned counsel appearing for the first and second respondents and Mr. R. Ashraf Khan, learned counsel appearing for the fourth respondent.

6. The learned counsel appearing for the first and second respondents made a vehement contention that, though the suit is of the year 2008, the revision petitioner / fourth defendant claimed to have successively evaded the service of the summons from the Court below and ultimately, after getting permission from the Court, substituted service was effected and even after substituted service, since the revision petitioner did not chose to appear before the Court, he was set exparte and thereafter, it took two years to pass the exparte decree.

7. After the exparte preliminary decree was passed, after long time, knowing well that, the proceedings have been gone on against him, before the trial Court, the revision petitioner had come and filed the present IA. In this regard, the learned counsel appearing for the first and second respondents would also submit that, even though it was the claim of the revision petitioner that, he had knowledge about the exparte decree dated 09.09.2016, only on 13.07.2017, when he met the Sub-Inspector of Police, no documents to that effect have been filed before the Court below to substantiate the said reason which alone he adduced for the belated knowledge about the pendency of the suit.

8. The learned counsel would also submit that, in the counter affidavit, the first and second respondents had stated before the Court below that, the revision petitioner / fourth defendant successfully evaded the Court service for several years knowing very well the suit filed is pending against him and the said statements made by the respondents in the counter filed before the Court below, since has not been substantially denied by way of reply, which can very well be presumed that, he had knowledge about the pendency of the suit, therefore in that context, the present reasons given on the notice on him on 13.07.2017, informed by the Sub-Inspector of Police concerned, is a flimsy and unacceptable reason given by him, only for the purpose of condoning the delay, therefore was rejected by the Court below, hence, it does not require any interference from this Court.

9. The learned counsel appearing for the first and second respondents, in support of his contention has relied upon the decision of the Hon'ble Apex Court in ***Brijesh Kumar and others vs State of Haryana and others*** in ***Special Leave Petition (Civil) Nos. 6609 to 6613 of 2014*** and urged that, the acceptable reason for delay to the

satisfaction of the Court is prerequisite to show indulgence in condoning the delay and in case of more delay, indulgence shown namely by the Court, however in respect of inordinate delay showing, gesture as a routine procedure cannot be adopted and therefore since the case in hand can be categorized as a case of inordinate delay i.e., 310 days, indulgence cannot be shown to and in favour of the revision petitioner for condoning the said delay without plausible or acceptable reason to the satisfaction of the Court, he contended.

10. However, Mr. V. Karthikeyan, learned counsel appearing for the revision petitioner, in reply would submit that, there has been no summons served on the revision petitioner, who was the fourth defendant in the suit and moreover, the suit property according to him, was purchased by him long back and he had been enjoying the suit property for long years. When that being so, if at all the plaintiffs wanted to serve summons to the revision petitioner / fourth defendant, the actual or present address of the fourth defendant should have been noted and summons should have been issued to him, instead the fourth defendant was arrayed as a party in the suit with old address shown in

the sale deed executed long years back and in that address, the fourth defendant had never residing for past several years and this factor even though known to the plaintiffs, they have chosen to continue with the said old address and on that pretext, since the plaintiffs was not able to serve notice i.e., suit summons, they have conveniently taken the route of substitute service and therefore, the said service cannot be construed as an effective service, through which, it cannot also be construed, that the fourth defendant had every knowledge about the pendency of the suit.

11. I have also heard Mr. R. Ashraf Khan, learned counsel appearing for the fourth respondent who would submit that, during the pendency of the suit, some rapprochement between the plaintiffs and the third defendant had taken place, by virtue of that, the suit had been dismissed against the third defendant, who is the fourth respondent herein, hence the said factor is to be taken note of.

12. I have considered the said submission made by the learned respective counsel appearing for the parties and perused the materials placed before this Court.

13. The issue raised in this revision is in very narrow compass and in this revision, it has to be decided, whether the rejection of the application filed by the revision petitioner under Section 5 of the Limitation Act to condone the delay of 310 days in filing an application to set aside the exparte decree passed against the fourth defendant / revision petitioner, is justified or not.

14. No doubt, the law has been well settled in this regard especially in the context of condoning the delay application filed invoking Section 5 of the Limitation Act.

15. There are plethora of Judgments from the Hon'ble Apex Court in this regard, where the repeated line of mandate, was that, if the delay is very huge and inordinate, for which, there is no acceptable or plausible reason by the party to invoke Section 5 of the Limitation Act, in those cases, indulgence need not be shown.

16. Whereas, unmindful of the number of days of delay if plausible or acceptable reasons are given, through which, the party who

approaches the Court have been prevented from approaching the Court earlier in time and by virtue of that, if such Section 5 application is rejected, the substantiate right of the party is getting affected, then the Court can show its indulgence and in those cases, Section 5 application can be allowed.

17. Here in the case in hand, if the principle set out in the said judgment cited by the learned counsel appearing for the first and second respondents is pressed into service, that, as to whether the party who approaches the Court with Section 5 application had satisfactory reason as a condition precedent, the fact remains that on 13.07.2017 as claimed by the revision petitioner, he was shown the summon by the police station concerned, where he was informed that the suit has been decreed against him.

18. Even though that point was taken by the first and second respondents counsel, no document has been filed to that effect, paragraph 4 of the counter made by the first and second respondents shows that the revision petitioner had a knowledge about the pendency

of the suit, that statement is also not supported by any documents, therefore, this Court take both the submissions as oath against oath, without supporting any documents.

19. However in these circumstances, the revision petitioner who approaches the Court under Section 5 application makes it clear that, there has been no summons admittedly served on the revision petitioner / fourth defendant and only pursuant to the substitute service, the suit was decreed exparte against the fourth defendant.

20. In the absence of any suit summons served on the revision petitioner / fourth defendant, certainly the cases where the suit summons served and the cases where, suit summons not served and only substituted service effected, cannot be equated in a same pedestal, as both the cases are not equal, especially in the context of knowledge about the happenings in the Court.

21. Technically, the service of substituted service can be accepted by the Court to proceed further in the matter. However the

parties after coming to know about the proceedings approaches the Court to take remedial measures for the action taken against them and in that context, the service through substituted service cannot be equated with service of summons directly with the parties and from this angle, if we look at the present issue, certainly the reason cited by the learned counsel for the revision petitioner, which according to him, prevented him from approaching the Court in time, can very well be accepted.

22. In view of the aforesaid facts and circumstances and the discussions made above, this Court is of the considered opinion that, the Court below, while considering the application filed under Section 5 of the Limitation Act, has not gone into all these aspects in proper perspective, thereby the decision and conclusion arrived at by the lower Court in rejecting the said application through the impugned order, in the considered view of the Court, is erroneous.

23. Since the suit is of the year 2008, the revision petitioner / fourth defendant shall immediately file the written statement within a

period of two weeks from the date of receipt of a copy of this order and once the written statement is filed, the Court below is hereby directed to proceed with the suit in accordance with law and give its consideration for deciding the same at the earliest.

24. The suit dismissed against the fourth respondent herein, who was the third defendant in the suit, as submitted by the learned counsel, is hereby taken note of.

25. Resultantly, this Civil Revision Petition is deserved to be allowed, accordingly, the impugned order is set aside and the Civil Revision Petition is allowed. Consequently, connected Miscellaneous Petition is also closed. No costs.

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05.11.2019

Index: Yes / No

Speaking order / Non speaking order

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12/14

To

1. The Principal District Munsif Court,
Alandur.
2. The Sub-Inspector of Police,
Neellangarai.



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R. SURESH KUMAR, J.

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