



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.10.2019

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

**C.R.P. (MD) Nos.161 to 164 of 2019 (NPD)
and
C.M.P. (MD) .Nos.745 and 746 of 2019
in
C.R.P. (MD) .Nos.161 to 164 of 2019**

B.Shanthi ... Petitioner in
C.R.P.(MD).Nos.161 and 163 of 2019/
Appellant / Petitioner/15th Defendant

Lakshmi ... Petitioner in
C.R.P.(MD) .Nos.162 and 164 of 2019/
Appellant / Petitioner/11th Defendant

Vs.

1.Irulappan

2.Irulayee ... Respondents in all petitions/
Respondents/ Respondents /Plaintiffs

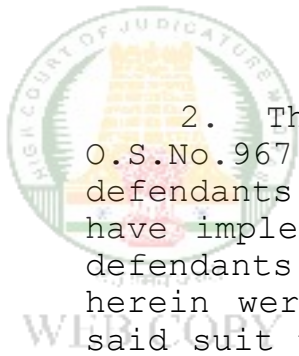
COMMON PRAYER: Petitions filed under Section 115 C.P.C. against the judgment and decree, dated 01.11.2018 passed in C.M.A.Nos.35, 36, 46 and 47 of 2017 by the II-Additional Sub Court, Madurai, confirming the order dated 22.06.2017 passed in I.A.Nos.442 and 443 of 2015 in O.S.No.967 of 2004 and I.A.Nos.444 and 445 of 2015 in I.A.No.818 of 2008 in O.S.No.967 of 2004 by the Taluk District Munsif Court, Madurai.

For petitioners in all
the petitions : Mr.T.C.S.Thillainayagam

For respondents in all
the petitions : Mr.S.Manohar

COMMON ORDER

These petitions have been filed by the petitioners/11th and 15th defendants in the suit questioning the concurrent judgments passed by the Courts below in the petitions for setting the *ex parte* preliminary and final decrees passed against them.



2. The respondents herein as plaintiffs have filed the suit in O.S.No.967 of 2004 for the relief of partition against the defendants 1 to 6 therein. Later, the respondents herein/plaintiffs have impleaded the subsequent purchasers of the suit properties as defendants 7 to 22 by way of an application, thereby the petitioners herein were impleaded as 11th and 15th defendant in the suit. The said suit was decreed in *ex parte* on 08.02.2008. Subsequently, the final decree application filed by the respondents/plaintiffs in I.A.No.818 of 2008 have also been allowed on 28.01.2011. During the pendency of the execution petition, the 11th defendant has filed I.A.Nos.443 of 2015 and 445 of 2015 seeking to set aside the *ex parte* preliminary decree and final decree, respectively. Similarly, seeking to set aside the *ex parte* preliminary decree and final decree, the 15th defendant has filed I.A.Nos.442 of 2015 and 444 of 2015 before the trial Court. The trial Court has dismissed the above applications. Challenging the same, the petitioners have filed C.M.A.Nos.35, 36, 46 and 47 of 2017. The first appellate Court has dismissed all the above appeals. Questioning the above concurrent judgments, the petitioners have filed these revision petitions.

3. The main contention raised by the learned counsel for the petitioners is that without service of notice, the petitioners were set *ex parte* and the preliminary and final decrees have been passed in the suit. Mere return of notice, which was sent to the petitioners/defendants 11 and 15, did not come under the meaning "deemed service". When the respondents herein attempted to clean the disputed property on 25.02.2012, the petitioners lodged a criminal complaint and then only, they came to the knowledge of the decrees passed in the suit. He would further submit that due to wrongful drafting, the 11th defendant was shown to be appeared through a counsel in the preliminary decree. The Courts below, without considering the above aspects in proper perspective, has dismissed the petitions. Thus, he prayed to allow all the revision petitions.

4. The learned counsel for the respondents submitted that the petitioners have purchased a small extent in a suit property only after filing of the suit and therefore, doctrine of *caveat emptor* applies to the revision petitioners. He would further submit that notice sent to the petitioners in the address mentioned in the sale deeds were returned and therefore, as per the orders of the trial Court, paper publication was effected and even thereafter, the petitioners did not appear before the Court and therefore, they were set *ex parte* and the decrees were passed. He would further submit that the petitioners have filed the petitions for setting aside the preliminary and final decrees, without filing a petition to condone the delay in filing the said petitions and therefore, the said petitions are not maintainable. The Courts below after analysing these things in proper perspective, have concurrently dismissed the petitions and therefore, the same need not be interfered with. Thus, he prayed to dismiss the revision petitions.



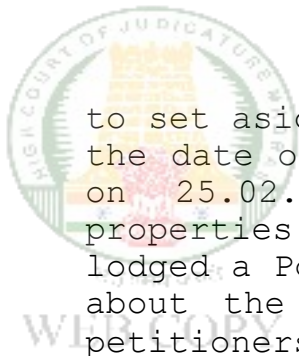
5. Heard the learned counsel for both sides and perused the materials available on record.

6. Admittedly, the respondents herein have stated to be filed the suit for partition on 26.02.1997 and the same was numbered as O.S.No.155 of 1997, which was subsequently renumbered as O.S.No.967 of 2004. The petitioners herein were purchased a portion of the suit property from the defendants in the suit on 06.03.1998. The petitioners herein along with the subsequent purchasers of the properties were impleaded in the suit only on 06.07.2006, based on the order passed in the impleading petition by the trial Court in I.A.No.155 of 2005. Admittedly, notice sent to the petitioners herein were returned as unserved. According to the petitioners, they were living in the address mentioned in their sale deeds till 2000 and thereafter, they shifted their residence. According to the respondents, due to return of notice, they have effected substituted service as per the order of the trial Court. Due service is not always substituted service, but service which has been effective in bringing the claim to the knowledge of the defendant.

7. Order 9 Rule 13 envisages two different situations. It provides for setting aside of *ex parte* decree where summons have not been duly served on the defendant or where he is prevented by any sufficient cause from appearing when the suit is taken up for hearing. Admittedly, in this case, it is not in dispute notices have not been served to the petitioners and paper publication has been effected straightaway without following the other modes of service. As stated earlier, the substituted service cannot be stated to be due service. It is seen that due to inadvertence, the 11th defendant was shown to be appeared through a counsel in the preliminary decree, though she has not appeared through any counsel.

8. Though the petitioners are stated to be *pendente lite* purchasers, the respondents themselves took steps to implead them in the suit and as such, the petitioners were impleaded as 11th and 15th defendants. When the respondents very well knew about the smaller extent of properties purchased by the petitioners from the defendants 1 to 6 in the suit, the respondents/plaintiffs herein as well as the defendants 1 to 6 therein could have seen that the said properties allotted to the share of the defendants 1 to 6. If it had been done so, there would not be any problem in respect of the right of the petitioners. But, it has not been done so.

9. According to the respondents, the petitions filed for setting aside the *ex parte* decree are liable to be dismissed on the ground of non filing of petitions for condonation of delay in filing such petitions. As per the Limitation Act, a petition to set aside the *ex parte* decree should be filed within 30 days from the date of decree and where the notice was not duly served, a petition



to set aside the *ex parte* decree should be filed within 30 days from the date of knowledge of the decree. According to the petitioners, on 25.02.2012, the respondents herein trespassed into their properties and attempted to clean the same and hence, they have lodged a Police complaint and thereafter, they came to the knowledge about the decrees passed by the trial Court. On 27.03.2012 the petitioners have filed the petitions to set aside the *ex parte* decrees. Therefore, it can be reasonably concluded that those petitions have been filed within 30 days of their knowledge and therefore, the delay in filing the petitions had not arisen. Though the respondents have stated that the petitioners were aware about the preliminary decree, more particularly when the Advocate Commissioner visited the disputed property in respect of final decree application, it has not been substantiated by any evidence. It is seen that merely based on such oral statement made by the respondents, the Courts below have come to a conclusion on presumption and assumption that the petitioners might have known about the pendency of the suit earlier, which cannot be accepted.

10. The Courts below have dismissed the petitions filed by the petitioners on the ground that the respondents/plaintiffs are senior citizens and if the petitions for setting aside the *ex parte* decrees allowed, after these long years, that would cause injustice to the respondents. As the rights of the petitioners have been infringed, the said ground cannot be countenanced. As stated earlier, knowing fully well that the petitioners have purchased a portion of the suit property from the defendants 1 to 6, the respondents could have taken some steps to allot the said property to the defendants 1 to 6 even though the petitioners did not appear before the Court. It is seen that the Courts below have allotted the plots, who have purchased from the defendants 1 to 6, in respect of the defendants 12, 18 and 19. The said equity could have been extended to the petitioners, but it has not been done merely because they did not appear before the Court. Though the petitioners have disputed only a smaller portion in the suit properties, the decrees cannot be set aside in piecemeal and therefore, the entire decrees are liable to be set aside. In view of the above and in order to give an opportunity to the petitioners, this Court is inclined to set aside the concurrent judgments passed by the Courts below. However, considering the age of the respondents and year of the suit, this Court is inclined to direct the trial Court to dispose of the suit within a stipulated time.

11. In the result, all the revision petitions are allowed and the concurrent judgments passed by the Courts below are set aside and the suit is remitted to the file of the trial Court for fresh trial. The trial Court is directed to conduct trial on day-to-day basis and dispose of the suit within a period of four months from the date of receipt of a copy of this order. Both the parties are directed to cooperate with the trial Court for disposal of the suit



at the earliest. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

gcg

To

1.The II-Additional Subordinate Judge,
Madurai.

2.The Taluk District Munsif,
Madurai.

3.The Record Keeper, (2 copies)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+4 CC to Mr.T.C.S.THILLAINAYAGAM, Advocate (SR-93362[F] dated 21/10/2019)

+1 CC to Mr.S.MANO HAR, Advocate (SR-93445[F] dated 22/10/2019)

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