



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

C.R.P.(MD).No.1621 of 2019
and C.M.P.(MD).No.8492 of 2019

Amarraj .. Petitioner/Petitioner/1st defendant

Vs.

1.Meera

2.Ramani

.. Respondents 1 & 2/Respondents 1 & 2/
Plaintiffs

3.Viswanathan

.. Respondent No.3/Respondent No.3/
2nd Defendant

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the fair and decreetal order passed in I.A.No.74 of 2019 in O.S.No.95 of 2017 dated 01.08.2019, on the file of the Additional District Judge, Fast Track Court, Kumbakonam.

For Petitioner : Mrs.M.Maria Vinola

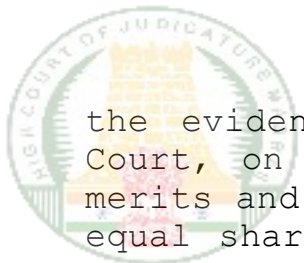
For Respondents 1 to 3 : No appearance

ORDER

This civil revision petition has been filed challenging the fair and decreetal order passed in I.A.No.74 of 2019 in O.S.No.95 of 2017, dated 01.08.2019, on the file of the Additional District Judge, Fast Track Court, Kumbakonam.

2.This Court ordered notice to the respondents 1 to 3. Though notices have been served on them and proof was filed for the same on 26.09.2019, none appears for them. The name of the respondents 1 to 3 are also printed in the cause list. Therefore, they are set ex-parte.

3.The suit in O.S.No.95 of 2017 was filed by the respondents 1 and 2 herein as plaintiffs on the file of the Additional District Judge, Fast Track Court, Kumbakonam, for preliminary decree for partition with regard to their $\frac{1}{2}$ share in the suit properties. Summons were ordered to the defendants. Since the first defendant has not entered into appearance, he was called absent and set ex-parte on 24.11.2017. The second defendant has filed his written statement. Therefore, after framing the issues, trial has been commenced. After considering

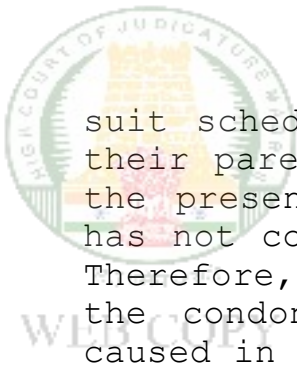


the evidences on record and the documents available, the trial Court, on 20.06.2018, passed preliminary decree for partition on merits and directed to divide the suit schedule property into four equal shares and allot one share to each plaintiff. Thereafter, on the basis of the preliminary decree, petition for final decree for partition was filed in I.A.No.16 of 2019 by the plaintiffs. When notice for final decree was ordered and served to the 1st defendant/revision petitioner, he came to know about the ex-parte order. Hence, he filed a interlocutory application in I.A.No.74 of 2019 in O.S.No.95 of 2017 to condone the delay of 263 days caused in filing the petition to set aside the ex-parte preliminary decree, dated 20.06.2018, passed against him. Since, the same was dismissed by the trial Court, the revision petitioner has come forward with this civil revision petition.

4.It is the case of the first defendant/revision petitioner that without serving the suit summons, the bailiff of the Court below, made an endorsement as if the suit summon was served to him. The trial court wrongly stated that the suit notice was affixed in the house of the first defendant. But, in fact, it was wrongly stated by the Junior Bailiff as the summon for "D2 - affixed as absent" and for "D1 - Served" instead of "D1 - affixed as absent" and "D2 - Served". The learned counsel for the revision petitioner further submitted that if the first defendant is not available and if the suit summon was not served, the Court below has to order fresh notice. But, the Court below, based on the wrong statement given by the Bailiff, set the first defendant ex-parte on 24.11.2017. Thereafter, the ex-parte preliminary decree was passed on 20.06.2018. However, the Court below, without considering these facts and accepting the memo of the second respondent, dismissed the present application.

5.The second respondent filed a memo stating that the revision petitioner/first defendant is brother of the second defendant. Though the first defendant was set ex-parte, the second defendant categorically stated that the first defendant is his brother and the suit schedule property is the ancestral property of their parents and recording the memo, the Court below has held that the interest of the first defendant will not be affected and hence, dismissed the condone delay petition.

6.According to the revision petitioner, without serving the suit summons, he was set ex-parte. He further stated that his parents having many more properties, but only few properties were included in the present suit. If he would have been allowed to make representation in the suit, he would have brought all the facts. But, now he was set ex-parte. Unless or other wise, the said order is set aside, he will not have any chance to bring all these facts to the court so as to make suitable amendment in the



suit schedule properties by bringing all the properties owned by their parents, which are all made available to all the parties to the present suit. Therefore, he contended that the court below has not considered all these facts and dismissed the application. Therefore, he filed the present civil revision petition to allow the condone delay petition and condone the delay of 263 days caused in filing a petition to set aside the ex-parte order of the court below.

7. Heard the learned counsel for the revision petitioner and despite service of notice on the respondents 1 to 3, they have not chosen to appear, and hence, they are set ex parte.

8. I.A.No.74 of 2019 was filed to condone the delay of 263 days in filing the petition seeking to set aside the ex-parte decree, dated 20.06.2018 made in O.S.No.95 of 2017. In the said suit, the revision petitioner was set ex-parte on 24.11.2017. Admittedly, on perusal of the memo filed by the Bailiff, it appears that he returned the summons as if first defendant was not served, since he was not available on that address. However, he has stated that he affixed the same on the door of the first defendant's house.

9. As the Bailiff returned the summons due to the non availability, the court below should have followed Order V Rule 20 C.P.C. to effect the service. However, in the present case, the Court below miserably failed to follow the Order V Rule 20 C.P.C., which reads as follows:

20. Substituted Service.-(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

[(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain]

(2) **Effect of Substituted Service.**- Service substituted by order of the Court shall be as if it has been made on the defendant



personally.

(3) **Where service substituted, time for appearance to be fixed.** - Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

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10.From the above provision, it is clear that if the suit summon was not served by the Bailiff in person and the same was returned, the Court below should order for substitute service. As there is a failure on the part of the court to order substitute service and in the interest of justice, this Court is of the view that the revision petitioner/first defendant should be provided an opportunity to defend his case.

11.It is stated by the revision petitioner that he came to know the ex-parte order only when the notice in the petition for final decree was served. Therefore, immediately he came forward and filed the application to condone the delay of 263 days in filing the application to set aside the ex-parte decree. This Court is of the view that there is no justification on the part of the court below in dismissing the application for condoning the delay and hence, this Court is inclined to interfere with the order passed by the Court below and the accordingly, the order of the court below in I.A.No.74 of 2019 in O.S.No.95 of 2017, dated 01.08.2019, is set aside and the delay of 263 days in filing the petition seeking to set aside the ex-parte decree is condoned.

12.Accordingly, this civil revision petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(AD-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

TM

To

1.Additional District Judge, Fast Track Court, Kumbakonam.



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

+1 CC to M/s.M.MARIA VINOLA, Advocate (SR-93824[F] dated
23/10/2019)

C.R.P. (MD) .No.1621 of 2019
22.10.2019

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TR(31.01.2020)5P 5C