



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.04.2019

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P(PD) (MD)No.2388 of 2011

and

M.P(MD)No.1 of 2011

WEB COPY

G.Varatharaj

... Petitioner

vs.

1)V.Rathinam

2)V.Jeganath

3)V.Amarnath

... Respondents

Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order made in C.M.A.No.26 of 2010 by the Principal District court, Dindigul, dated 30.06.2011 reversing the fair and decreetal order made in I.A.No.242 of 2009 in O.S.No.243 of 2003 by the Sub Court, Palani, dated 16.07.2010.

For Petitioners : Mr.D.Venkatesh

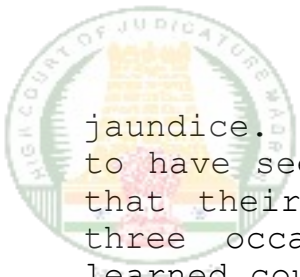
For Respondents : Mr.T.Lenin Kumar

ORDER

Against the reversing judgment of the lower appellate court allowing of the restoration petition to restore the condone delay petition filed to condone the delay of 277 days in filing the petition to set aside the exparte order passed in the suit, this revision petition is filed by the plaintiff.

2.The facts of the case are that the revision petitioner as plaintiff has filed a suit for specific performance against the respondents/defendants. The respondents were set exparte and exparte decree was passed in the suit on 21.10.2005. To set aside the exparte decree, the respondents filed a petition along with condone delay petition. The condone delay petition was dismissed for the non appearance of the respondents and therefore, the respondents filed a petition to restore the condone delay petition which was dismissed, against which, the respondents/defendants filed a Civil Miscellaneous Appeal, whereby, the lower appellate court allowed the restoration petition, against which, the petitioner/plaintiff has filed this revision petition.

3.Learned counsel for the petitioner would contend that the lower appellate court has erred in allowing the restoration petition by accepting the reason for non appearance of the respondents, without considering the fact that on earlier occasion also, the 1st respondent pleaded the very same reason that she was suffering from



jaundice. He further contended that the lower appellate court ought to have seen that the attitude of the respondents clearly indicates that their intention is only to prolong the case and already on three occasions, the respondents were set exparte. Thus, the learned counsel prays for allowing this revision petition.

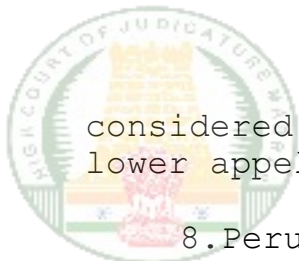
WEB COPY

4.Learned counsel for the respondents would submit that the lower appellate court having convinced with the reasons stated by the respondents, has rightly allowed the restoration petition which does not require interference by this Court.

5.Heard both sides and perused the records.

6.Perusal of record shows that the petitioner filed a specific performance suit and on 08.12.2003, since the respondents were called absent, they were set exparte and exparte decree was passed in the suit and the same has been set aside vide order dated 15.12.2003 in I.A.No.1013/2003 filed by the respondents. Thereafter, when the suit was posted for cross examination of PW1, the respondents were again called absent and therefore, they were set exparte and exparte decree was passed on 21.10.2005 and to set aside the exparte decree, the respondents filed a petition along with I.A.No.49 of 2007 to condone the delay of 277 days in filing the petition to set aside the exparte decree dated 21.10.2005. In support of the reasons for 277 days delay, the 1st respondent stated that she suffered from jaundice and therefore, she could not contact the advocate and appear on 21.10.2005. Thereafter, when I.A.No.49 of 2007 was taken up for hearing on 05.06.2009, the respondents were called absent and therefore, the Trial Court dismissed I.A.No.49 of 2007. Subsequently, the respondents filed I.A.No.242 of 2009 to restore I.A.No.49 of 2007. The Trial Court dismissed I.A.No.242 of 2009 holding that the respondents remained exparte on three times and despite receipt of notice in E.P filed by the petitioner, they did not appear in E.P and therefore, E.P has been adjourned and the restoration petition is only an attempt to protract the proceedings. Against the dismissal of the restoration petition, the respondents filed C.M.A.No.26 of 2010 before the Principal District court, Dindigul. The lower appellate court accepting the reason that the 1st respondent suffered by jaundice and observing that I.A.No.49 of 2007 was dismissed on 05.06.2009 and restoration petition in I.A.No.242 of 2009 was filed within 10 days from the dismissal of I.A.No.49 of 2007, allowed the appeal, against which, the petitioner/plaintiff has filed this revision to set aside the order passed by the lower appellate court.

7.Perusal of the order passed by the lower appellate court shows that it has not considered the past absence of the respondents and failed to note that in the suit, the respondents remained absent on two times and when the condone delay petition was filed with the averment of jaundice, the very same reason is stated in the restoration petition also and that the non appearance of the respondents in E.P despite receipt of notice, was also not



considered by the lower appellate court. Thus, it is seen that the lower appellate court has mechanically allowed the appeal.

8. Perusal of record also shows that in the condone delay petition to set aside the exparte decree, for 277 days delay, the 1st respondent has simply stated that she suffered from jaundice and therefore, could not contact the advocate and appear before the court and when condone delay petition was dismissed for non appearance of the respondents, the respondents moved restoration petition in I.A.No.242 of 2009 assigning the very same reason of jaundice. Though the lower appellate court allowed the appeal observing that restoration petition was filed within 10 days from the date of dismissal of the condone delay petition, the previous conduct of the respondents in prosecuting the case does not reflect bona fide. It is a specific performance suit and though exparte decree was passed on earlier occasion, it was set aside at the instance of the respondents and now second time, when the suit was decreed exparte, the respondents again filed a petition to set aside the exparte decree with the delay of 277 days and being not appeared, they let the condone delay petition be dismissed and subsequently filed restoration petition assigning the very same reason stated in the condone delay petition which itself shows that the intention of the respondents is only to protract the proceedings. Therefore, the order passed by the lower appellate court is liable to be set aside and the order of the Trial court shall be restored.

9. Accordingly, the fair and decreetal order made in C.M.A.No.26 of 2010 by the Principal District court, Dindigul, dated 30.06.2011, is set aside and the fair and decreetal order made in I.A.No.242 of 2009 in O.S.No.243 of 2003 by the Sub Court, Palani, dated 16.07.2010, is restored.

The Civil Revision Petition is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

/ True Copy /

Sub Assistant Registrar(CS)

To

1) The Principal District Judge, Dindigul.

2) The Sub Judge, Palani.

C.R.P(PD)(MD)No.2388 of 2011

23.04.2019