

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on :11.10.2020

Pronounced on : 18.12.2020

CORAM :

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRP.(NPD).No. 1947 of 2020
and
CMP.No. 12022 of 2020

1.Venkatesappa
2.Mallesappa

... Petitioners

Versus

1.Kempamma
2.Narayanappa
3.Jogappa
4.Mohan

... Respondents

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 28.07.2020 passed in I.A.No.234 of 2015 in O.S.No. 84 of 2009 on the file of Principal Suboridnate Court, Hosur.

For petitioners : Mr. K.Govi Ganesan

For Respondents : Mr. S.C.Vishwanth

ORDER

The revision petitioners are the defendants 11 and 12 in the original suit in O.S.No.84 of 2009 therein.

2. The Civil Revision Petition has been filed under Section 115 of CPC., against the order passed in I.A.No.234 of 2015 in O.S.No. 84 of 2009, dated 28.07.2020, by the Principal Subordinate Court, Hosur.

3. The respondents/plaintiffs have filed the suit in O.S.No. 84 of 2009 before the learned Subordinate Judge, Hosur, for partition, separate possession and for permanent injunction. As per the plaint averments, the first plaintiff is the daughter of the second wife of Periya Borappa. The respondents/defendants are the sons of the first wife, by name Kempamma. After the death of his first wife, Periya Borappa had married Uchamma as his second wife about 60 years ago and through her, he had begotten a daughter by name Kempamma, the first plaintiff herein. The said Uchamma also died about 60 years ago leaving behind her daughter, by name Kempamma, the first plaintiff herein as stated above as her legal heir

to succeed her and the second plaintiff is the son of the first plaintiff. The said Periya Borappa had also died in the year 1991, leaving behind the first plaintiff and the defendants 1 to 7 as his legal heirs to succeed him. The plaintiffs are in joint possession and enjoyment of the suit schedule properties along with the defendants 1 to 7 and there is no partition by metes and bounds among them. Thereafter, the written statement was filed by the defendants 11 and 12 before the Court below and following the same, Mallesappa (PW1), was examined and thereafter, the defendants have not come forward to cross examine PW1. The respondents have obtained ex-parte decree on 02.11.2009.

4.(a) According to the respondents, the respondents filed I.A. No.163 of 2010 being final decree petition and notices have been served on the petitioners in the final decree petition and hence, they did not appear before the Court below. The petitioners were set ex-parte in the final decree petition on 11.06.2010.

(b) Again, the respondents filed E.P.No. 80 of 2012 for delivery of possession and in that petition, notices have been served on the petitioners, but they had not appeared before the court below on 27.08.2014 and consequently they were set ex-parte and delivery

was ordered on 18.11.2014.

(c) There are laches on the part of the petitioners in each and every stage of the proceedings and there is abnormal delay in filing the present petition and the petitioners have not explained each and every day's delay.

(d) But the respondents have produced documents and established that the summons have been served on the petitioners in the suit final decree proceedings, and execution proceedings.

(e) Furthermore, the second petitioner categorically admitted in his cross examination that while the Commissioner measured the suit properties to make a division, he was present and after six months, he has filed the present petition.

(f) Subsequently, the present application has been filed in I.A. No.234 of 2015 under Section 5 of the Limitation Act to condone the delay of 1925 days in filing the application under Order 9 Rule 13 of the Code of Civil Procedure to set aside the ex-parte decree on 02.11.2009.

(g) The point for consideration before the Court below was that the suit summons were not served on them in the partition suit in O.S.No.84 of 2009 before the Principal Subordinate Court, Hosur.

(h) During enquiry, the petitioner was examined as PW1 and two other persons were examined as PW2 and PW3. On the side of the petitioners, Ex.P1 to Ex.P5 were marked. On the side of respondents, one Mr.Narayanappa was examined as RW1 and Ex.R1 to R8 were marked. The Court below has dismissed the aforesaid application in I.A.No.234 of 2015 made in O.S.No.84 of 2009, dated 28.07.2020. Hence, the present revision has been filed by the petitioners/defendants 11 & 12.

5. Heard Mr.K. Govi Ganesan, learned counsel for the petitioners and Mr.S.C. Vishwanth, learned counsel appearing for the respondents and perused the materials placed on record.

6. The learned counsel for the revision petitioners/defendants 11 and 12 contended that the suit summons were not served on the petitioners in the original suit and also summons were not served in the final decree proceedings in I.A. No.163 of 2010 and no notice was also served in the Execution Proceedings in E.P. No.80 of 2012

for delivery of possession.

7. On a perusal of the counter affidavit filed by the respondents before the Court below, it is seen that the entire list of details of the service of summons on the side of the defendants 6 to 15 were set out along with dates. Further, the engagement of Advocate Commissioner has also been set out. During final decree proceedings, an Advocate Commissioner was also appointed by the Court below to inspect the suit property and notices were served on the petitioners/defendants on behalf of the respondents/plaintiffs. Pursuant to the same, the respondents have also produced documents before the Court below in Ex.R5 to Ex.R8 which shows that on each and every stage of the proceedings, notice had been served on the petitioners. Despite notices having been duly served on the petitioners/defendants, they have not entered appearance before the Court below in the initial stage of the proceedings through their advocate.

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8. The learned counsel for the petitioners/defendants 11 & 12 submitted that no notice was served at any stage of the proceedings which appears to have been incorrect and there is suppression of material facts, on a combined reading of Ex.R5 to Ex.R8, it is clear

that the petitioners/defendants herein have received the summons and it was duly served in the Execution Petition and also in the final decree proceedings in the original suit and it is proved that notices have been duly served on the petitioners at each and every stage of the proceedings.

9. During cross examination, PW1 has categorically admitted that the Advocate Commissioner came to the suit properties and measured the same, for effecting the division of the property. At that time, the petitioners were present during the inspection and measuring the suit properties by the Advocate Commissioner. It is also elucidated from the cross examination of PWs, that after six months, the present application is filed in I.A. No.234 of 2015 in O.S. No. 84 of 2009 to condone the delay of 1925 days in filing the application under Order 9 Rule 13 of CPC., to set aside the ex-parte decree on 02.11.2009.

10. Admittedly, the partition decree is of the year 2009 and final decree proceedings was initiated in I.A.No.163 of 2010 and notices have also been duly served on the petitioners in the final decree proceedings on 11.06.2010. Thereafter, the respondents have filed Execution Petition in E.P. No.80 of 2012 before the Court

below and in that Execution Petition, notices have also been duly served on the petitioners. It is seen that the petitioners had not appeared before the Court below and consequently, they were set ex-parte and delivery of possession was ordered on 18.11.2014 and hence, I find that the petitioners have not come to the Court with clean hands and the aforesaid delay was not condoned by the Court below, as no sufficient cause shown to condone the delay of 1925 days.

11. On the contrary, the petitioners/defendants appear to have filed this revision petition by suppressing the material fact that they have been served suit summons and notices were also served at each and every stage of the proceedings and hence, I am of the considered view, that the petitioners who are the defendants 11 and 12 in the suit and hence, I am not inclined to admit this revision. The Court below has rightly rejected the aforesaid petition and in the absence of any irregularity or illegality in the order passed by the Court below, the same is hereby confirmed.

12. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

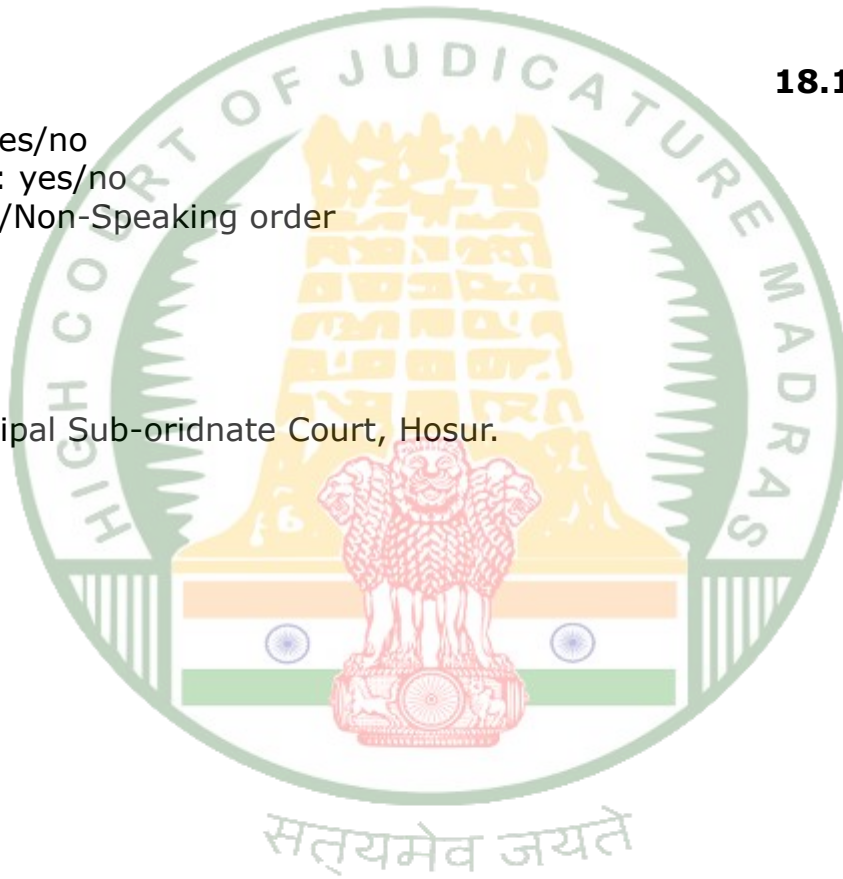
18.12.2020

Index : yes/no
Internet : yes/no
Speaking/Non-Speaking order

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To

The Principal Sub-ordinate Court, Hosur.



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RMT.TEEKAA RAMAN,J.,

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**Pre-delivery order in
CRP.(NPD).No. 1947 of 2020
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