

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.01.2020

CORAM :

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRP.(NPD).No.2239 of 2012

Vedanayaki

... Petitioner

Versus

Pachiammal (died)

Annapoorani

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the Fair & Decreetal order dated 03.02.2012 in I.A.No.263 of 2010 in C.F.R.No.5465 of 2010 on the file of the Principal District Judge, Erode.

For petitioner : Mr.P.Valliappan
For Respondents : Mrs.V.Srimathi

ORDER

The second defendant in the suit O.S.No.3 of 1998 is the revision petitioner. The plaintiff/Pachiammal (deceased) is the mother of the present revision petitioner and the second respondent. The suit in O.S.No.3 of 1998 was filed by the plaintiff/Pachiammal before the Sub-Court, Bavani for partition of 1/3rd share in the suit schedule property. In the said suit, the present petitioner had filed a written statement contending that the existence of the said Settlement Deed,

dated 05.06.1980 and the registration copies were also filed. As far as the preliminary decree dated 31.08.2000 is concerned the present petitioner was set ex-parte, subsequently, she filed an application in I.A.No.255 of 2001, to set aside the ex-parte decree, which was dismissed on 09.08.2001, on the ground that the preliminary decree was passed on merits.

3. Therefore, the petitioner filed an appeal in CMA.No.85 of 2001 before the II-Additional District Court, Erode and the same was dismissed on 25.08.2005. Consequently, the petitioner filed a Civil Revision Petition in CRP.No.1065 of 2003 before this Court, which was dismissed on 25.08.2005 with liberty to the petitioner to file an appeal with an application to condone the delay.

4. Accordingly, the petitioner filed an appeal before the District Court, Erode in CFR.No.15261 of 2006 with an application in I.A.No.146 of 2006 to condone the delay. The condone delay application was dismissed on 28.11.2006 and the same order was challenged by the petitioner herein under the Civil Revision petition. The CRP.No.1065 of 2003, which was filed by an advocate Mr.Bhuvaneswaran, who shifted his practice from Erode to Chennai and returned back to Erode and resumed his practice at Erode, which resulted in delay. Due to the same, the said Civil Revision Petition was

dismissed for non-prosecution.

5.Subsequently, on dismissal of the Civil Revision Petition, the petitioner filed an application for setting aside the final decree dated 27.10.2006 passed by the District Court, Erode. The District Court, Erode dismissed the application filed by the petitioner for setting aside the final decree on the ground that the delay could not be condoned. Hence, the petitioner is constrained to file the present Civil Revision Petition before this Court.

6.Heard the learned counsel for the petitioner and the learned counsel for the respondents and perused the materials available on record.

7.At the outset, it is seen that originally, the plaintiff/Pachiammal mother of the present petitioner/Vedanayaki filed the suit for partition of 1/3rd share of the suit property, which was resisted by the petitioner on the ground that the settlement deed was executed by the petitioner's father in favour of the two daughters and the plaintiff is having life estate only. As the present petitioner has not contested the suit, the suit was decreed and the preliminary decree was passed. When she filed petition to set aside the ex-parte preliminary decree the same was dismissed on the ground, it was a

contested decree. As against the same a civil revision petition was filed but due to shifting of the petitioner's practising advocate from Chennai to Erode, it was not represented and the revision petition appears to be dismissed for default. In the meanwhile, I.A. No. 50 of 2001 was passed for passing final decree and to allot a share to the plaintiff. The final decree was also passed on 27.10.2006. While so, an application in I.A.No.263 of 2010 was filed for for setting aside the final decree.

8.On perusal of the records, this Court finds that no notice has been issued to the petitioner herein by the Advocate Commissioner, and furthermore no notice has been issued in the application for passing of final decree and it assumes significance.

9.It is seen that after dismissal of the first round of litigation which culminated in passing orders by this Court in Civil Revision Petition, the present application is filed along the petition to condone delay for filing regular appeal against the final decree proceedings and the same was rejected by the learned Principal District Judge, Erode. In support of the plaintiff's claim, the power of agent was examined as PW1, who deposed about the various Judicial proceedings taken to set aside the order of the Trial Court in the Sub-Court to the High Court and subsequently by filing regular appeal

against the final decree proceedings with delay. Vedanayagi, the second defendant was examined and deposed that the present petitioner and the respondents are sisters. The elder sister married his maternal uncle, who is brother of her mother/Pachiammal and she married a Doctor by profession. There was some enmity with the family members and hence, her elder sister married the maternal uncle who instigated their mother to file a partition suit and claiming 1/3rd share from the suit property.

10.By perusing the settlement deed executed by the father of the parties, whereby the suit property was ordered to be divided into 1/2 share and the matter can be considered for before passing of the preliminary decree not in the final decree. The second point raised about the condone delay petition is that her husband, was in foreign service, subsequently he moved to America and they are not aware of the proceeding as their residing America and hence, they have appointed PW.1 as a power of agent to take the case.

11.Taking into consideration the proceedings and the reasons stated for filing the condone delay petition, it is no disputed by the respondent herein that she lived in America, her husband is Doctor by profession as deposed in the cross examination is also assumes significance.

12.Besides all they have not challenging the preliminary decree proceedings as the same has resulted in passing an ex-parte order, and the present I.A. filed for passing of the final decree and the address of the petitioner is also stated that they are in abroad, which lends support to the averments made by PW.2 in the witness box.

13.Admittedly, the Advocate Commissioner did not issue any notice before inspecting the property, as it could be seen from the Advocate Commissioner's report.

14.Yet another point glaring on the record is item no.1 of the suit property was not considered by the Advocate Commissioner and the another point is the distribution of the property is not even by good and bad soil and the profit and loss value has to be determined in the regular appeal only against the final decree proceedings.

15.Taking note of the above facts on entirety consideration and also fact that the even in the final decree, the address of the petitioner was stated to be incorrect and the petitioner did not receive any notice of order and rejecting the application to condone the delay of 1230 days in filing the appeal against the final decree dated 27.10.2006 and the final decree was passed behind the back of the petitioner, when the causes of substantial justice and technical

considerations are pitted against each other, the Courts always prefer the former. The petitioner has shown sufficient cause for condoning the delay and it is a hyper technical approach in declining to condone the delay.

16.Taking into consideration the entirety of the matter, evidence available on record, this Court has satisfied that the petitioner was offered sufficient cause for filing the petition to condone the delay to file a regular appeal against the final decree and also taking note of the fact that all the issues as discussed supra, this Court is inclined to allow the Civil Revision Petition on condition to pay a sum of Rs.6000/- to the Advocate, who appearing for the respondent herein before the Court below, within a period of three weeks from the date of receipt of a copy of this order and I.A.No.263 of 2010, for condoning the delay in C.F.R.No.5465 of 2010 before the learned Principal District Judge, Erode is also allowed.

17.Trial Court is directed to number the regular appeal and dispose of the same within a period of four months from the date of receipt of a copy of this order.

06.01.2020

Index : yes/no
Internet : yes/no
Speaking/Non-Speaking order
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RMT.TEEKAA RAMAN,J.,

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To

The Principal District Judge, Erode.



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