

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[ORDERS RESERVED ON : 06.01.2020]

[ORDERS PRONOUNCED ON : 11.02.2020]

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

C.R.P.[NPD] No.887 of 2014
and
M.P.No.1 of 2014

G.Thirumoorthy

... Petitioner

.. Vs ..

1. R.Rajalakshmi
2. S.Balasundari
3. S.Padma
4. T.Kanniyakumari

... Respondents

Prayer:- Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 20.08.2013 made in I.A.No.200 of 2013 in O.S.No.2 of 2010 on the file of the I Additional Subordinate Judge, Salem.

For Petitioner : Mr.S.Kalyanaraman

For R-1 : Mr.Zeenath Begum

For RR-2 to 4 : No Appearance

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ORDER

The fifth defendant is the revision petitioner herein.

2. The first respondent herein has filed a suit in O.S.No.2 of 2010 before the trial Court for partition and the said suit was decreed. Subsequently, the revision petitioner herein along with defendants 1, 3 and 4 have filed an application in I.A.No.200 of 2013 under Section 5 of the Limitation Act and Section 151 of C.P.C. seeking to condone the delay of 226 days in filing the petition to set aside the ex-parte decree in O.S.No.2 of 2010, dated 09.03.2012. The first respondent herein/plaintiff has filed a counter opposing the said application on the ground that the decree dated 09.03.2012 is not an ex-parte decree and the shares have been determined on merits after examination of the parties to the suit.

3. The trial Court had dismissed the said application holding that what was passed is decree on merits and not an ex-parte decree and consequently, the petition under Order 9 Rule 13 of CPC does not

lie. Consequently, application under Section 5 of the Limitation Act seeking to condone the delay of 226 days was dismissed. Hence, the present Civil Revision Petition is filed before this Court.

4. Heard the learned counsel for the petitioner and the learned counsel appearing for the first respondent. There is no representation on behalf of respondents 2 to 4. This Court has perused the records available.

5. On perusal of records, it appears that one Rajalakshmi, the first respondent herein has filed a suit in O.S.No.2 of 2010 for the relief of partition and separate possession against 7 defendants. On receipt of summons, defendants 2, 6 and 7 have entered appearance through their counsels. The defendants 1, 3 and 5 have set ex-parte. Thereafter, the 6th defendant has filed written statement and the same was adopted by the seventh defendant, but the second defendant has not filed any written statement and set ex-parte. Therefore, the written statement filed by defendants 6 and 7 was taken into consideration by the trial Court and issues were framed as

per Order 14 of C.P.C. Subsequently, on 01.03.2012 the suit came up for trial. The plaintiff examined in chief and cross examined by defendants 6 and 7 and seven documents were marked on the side of the plaintiff. Thereafter, the trial Court heard the arguments of the plaintiff and defendants 6 and 7. The suit was disposed of on merits, by passing a preliminary decree for division of first item of the suit property, into six shares.

6. While so, the fifth defendant in the suit has now come forward with the two applications viz., one is under Order 9 Rule 13 of CPC to set aside the ex-parte decree and another application is under Section 5 of the Limitation Act, praying to condone the delay of 226 days. In the suit in O.S.No.2 of 2010, the revision petitioner herein was the fifth defendant. He was set ex-parte, following his non appearance, even after receipt of summons from the Court. However, defendants 6 and 7 have filed their written statements and contested the suit. The issues have been framed on the basis of the averments in the plaint and the written statement filed by the sixth defendant was adopted by the seventh defendant. Further, the

plaintiff has been examined as P.W.1 in the trial and 7 documents have been marked through her. Therefore, defendants 6 and 7 have participated in the trial.

7. In the decision of this Court reported in **2012 (1) CTC 666 [Ramasamy Vs. Kuppusamy Udaiyar (died) and others]**, this Court has held that the decree passed in the presence of one of many defendants, is not an ex-parte decree and further held that merely because two of the defendants remained ex-party as absent and set ex-parte, the decree cannot be treated as an ex-party, since some of the defendants have contested the case and cross-examined. On facts and circumstances of the case, the above ratio is squarely applicable to the facts of the present case. Accordingly, the order passed by the trial Court is well considered and well merited.

8. In the result, this Civil Revision Petition is dismissed and the order dated 20.08.2013 passed by the learned I Additional Subordinate Judge, Salem, in I.A.No.200 of 2013 in O.S.No.2 of 2010 is confirmed. It is open to the revision petitioner herein/fifth defendant

to file regular appeal. In the event of filing of the appeal before the trial Court, the time taken during the pendency of this petition shall stand excluded for the purpose of computation of limitation. No costs. The connected miscellaneous petition is also dismissed.

11.02.2020

Internet :Yes
Jrl

To

The I Additional Subordinate Judge,
Salem.



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C.R.P.(NPD).No.887 of 2014

RMT.TEEKAA RAMAN, J.

Jrl



Order made in
C.R.P.[NPD] No.887 of 2014

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