

C.M.P.No.16130 of 2019
in A.S.SR.No.86435 of 2019

M.M.SUNDRESH, J.
AND
KRISHNAN RAMASAMY, J.

(Order of the Court was made by *M.M.SUNDRESH, J.*)

The petitioner, who is the first defendant in the suit filed for partition and separate possession, has filed this appeal challenging the judgment and decree granted in O.S.No.129 of 2016 passed by the IV Additional District Judge, Tiruvallur at Ponneri dated 27.11.2017. The said decree was passed ex-parte due to the absence of the petitioner. Therefore, he filed an application seeking to set aside the said decree within time. The averment made in the affidavit filed on 14.12.2017 reads as under:-

"I submit that the above suit was filed by the petitioner/plaintiff partition against the defendants and not to encumbering or creating any charge, mortgage or any kind of alienation in the suit schedule property. The suit claim is fraudulent one since the petitioner already received her share by way of cash. The defendant

has a good case on merits and fair chance of success..... advocate to appear before this Court in the above said suit and my advocate also appeared before this Court and filed written statement and counter before this court on 15.09.2017 itself. However he could not be able to attend on 29.11.2017 because he was not feeling well and it was also not informed to me, that my counsel instructed his junior to represent before this court for want of time to enquiry and cross of pw-1. The junior Advocate has not represented the case on behalf me properly and this Court was pleased to pass on ex-parte decree on 29.11.2017 for default. Hence there is no wilful or wanton to non-appearance to defend the suit."

2. Unfortunately, he did not pursue the said application.

Thereafter, a copy application was made on 28.02.2019 and the copy of the ex-parte decree was obtained on 13.03.2019 along with the

judgment. After doing so, the present petition has been filed on 19.07.2019 seeking to condone the delay of 488 days in filing the appeal. In the affidavit filed in the support of the petition, the petitioner has made the following averments which is extracted below:-

"3. I state that after receipt of notice from the trial court I have engaged my counsel and filed vakalat on my behalf before the trial court, with my instruction written statement also been filed before the trial court. Thereafter, it was informed by my counsel that the case bundle has been misplaced. After trace out the bundle the trial court neither inform to my counsel not to me and posted the matter in my absence and remained set exparte. It is further state that the numbering clerk was committed suicide during the period of misplaced the suit bundle.

5. I state that being an uneducated I count not able to proceed the case further with due

diligence, since the suit has been set exparte.

For the above said reason, I could not able to file set aside application and consequently the exparte judgment was passed in favour of the plaintiff. Therefore, the delay of ... days has been caused in filing the appeal suit against the judgment and decree of the lower trial court. Even though the judgment passed on 27.11.2017 the copy application tagged with suit bundle on 28.02.2019 and copies delivered only on 13.03.2019."

3. These averments are totally contrary to the facts. The petitioner has not even stated about the earlier petition filed seeking to set aside the ex-parte decree. Admittedly, he was aware of the proceedings. The application to set aside the ex-parte decree has been filed within time but not pursued thereafter. It is not as if a copy application was tagged with the suit bundle. In fact, even after obtaining the judgment and decree on 13.03.2019, the present appeal

has been filed only on 19.07.2019. Therefore, apart from filing false affidavit, the petitioner has not explained the reasons correctly.

4. Though the learned counsel appearing for the appellant submitted that the petition may be ordered on costs particularly, in view of the fact that the suit is filed for partition and the averments are to be seen contextually, being mis-conception of facts, we are not inclined to do so.

5. The suit has been filed on 28.04.2016 and the petitioner has dragged on the matter till now. He has filed the present appeal only pursuant to the final decree proceedings initiated by the respondent, which factum is acknowledged in para 8 of the petition filed seeking condonation of delay. Thus, we are not inclined to allow this petition.

6. The Civil Miscellaneous Petition is dismissed accordingly. No costs.

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(M.M.S.,J.) (K.R.,J.)
29.01.2020

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