

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.09.2020

C O R A M

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.R.P.(PD) No. 2836 of 2019
and C.M.P.No.18571 of 2019

1. P.Thirupathiammal
2. P.Dhanaguru @ Saravanan
3. P.Bharani @ Kumaran

... Petitioners

Vs.

Thayammal @ Ramathayeeammal (Deceased)

P.Kuppusamy

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the order of the XV Assistant Judge, City Civil Court, Chennai, passed in I.A.No.12262 of 2018 in I.A.No.441 of 2016 in O.S.No.5215 of 2008 dated 27.06.2019.

For Petitioners : Mr.V.P.Sengottuvel

For Respondent : Mr.D.Srinivasan
for M/s.Kanimozhi Mathi

ORDER

The Civil Revision Petition is directed against an order of dismissal of the petition filed for condoning the delay of 637 days to set aside the ex-parte order dated 23.09.2016 in the final decree proceedings vide I.A.No.441 of 2016 in O.S.No.5215 of 2008.

2. The petitioners are co-sharers in the partition suit. The preliminary decree was challenged by the petitioners and they filed an appeal. As such, the plaintiff-mother was given a right of 1/4th share of the property belonging to the husband of the first petitioner and father of the second and third petitioners. In the final decree proceedings, notice was ordered to the petitioners/respondents herein. But, it was returned with an endorsement 'left'. Thereafter, it is the contention of the petitioners/respondents that it was returned as unclaimed at the subsequent event. However, the affidavit filed in support of the condone delay petition clearly shows that the petitioners have shifted their residence from the old address and they were residing in various rental houses, which is not disputed by the respondent. At the first instance, they have resided at Old No.5/1, New No.11/1, Siraj Street, Ayyavoo Colony, Aminjikarai, Chennai - 600029 upto December, 2008. Thereafter, they have

shifted their residence at Door No.3, Narasimhan Street, Ayyavoo Colony, Aminjikarai, Chennai – 600 029 upto 2009-2010. Again, they have shifted their residence in January, 2011, to the present address viz., No.90, 5th Street, Pulavar Pugazhenthai Nagar, Arumbakkam, Chennai – 600 106. The notice, which is said to have been ordered in the final decree application was returned with an endorsement 'left'. The trial Court, by its order, set the petitioners/ respondents ex-parte and proceeded further and appointed an Advocate Commissioner, who admittedly could not enter the premises and determine what is 1/4th share, however, proceeded to pass orders allocating the portion of the property in favour of the deceased mother.

3. The contention of the respondents before this Court is that the petitioners having contested the case throughout the trial proceedings and challenged the preliminary decree passed in the suit for partition before the appellate Court and having failed therein, are not entitled to claim that they were not aware of the final decree proceedings at all. It shows that they are totally lethargic and inactive in not prosecuting the final decree proceedings. When a person, who is deliberately with an ulterior intention to protract the proceedings, approaches the Court with the delay, he should not be entertained.

4. The learned counsel for the petitioners/respondents would rely on the judgment of the Hon'ble Supreme Court in the case of ***Balwant Singh (Dead) Vs. Jagdish Singh and Others*** reported in ***2010 (8) SCC 685***.

5. The said judgment may not be applicable to the case on hand. Here is a case, where during the pendency of the execution proceedings, the mother has expired and the present respondent is the second son, who claims as sole legal heir. Whether he is sole legal heir or not, whether he is entitled to a share or not through his mother is an issue that has to be decided. Without crystallising the specific share, the Court cannot order substitution and without determining, who are the legal heirs, the trial Court cannot decide the matter without hearing the petitioners, who are the stakeholders. In the matters of condoning the delay for non-appearance of the parties, the Court should look as to whether sufficient cause has been shown by the parties. Admittedly, the records show that the notice sent to the petitioners were returned with an endorsement 'left'. As observed in the previous paragraphs, the reason stated is sufficient to show that the petitioners had no notice or knowledge about the final decree proceedings due to shifting of their residence. I do not find any effective service made on the petitioners, who are the respondents before the trial Court.

6. The reasons stated by the petitioners that they were living in a rental premises and they have shifted their residence on two or three occasions are not disputed. The parties being closely related, they should have taken notice to the correct address of the other side in the partition suit. Without taking notice and allocating the share without measuring the property, but on the suggestion made by the Advocate Commissioner, is highly improper.

7. The contention of the respondents that paper publication was taken is not a conclusive proof that the petitioners were put on notice and it is only substituted service, which may slip the attention of the petitioners. In such circumstances, I feel that sufficient cause has been shown and that has not been properly considered by the trial Court. In such circumstances, the delay of 637 days in filing the petition to set aside the ex-parte order deserves to be condoned and accordingly, the delay is condoned. The order passed by the trial Court is set aside.

8. The Hon'ble Supreme Court in the case of *N.Balakrishnan Vs.*

M.Krishnamurthy reported in (1998) 7 SCC 123, wherein, the Hon'ble

Supreme Court has categorically held that in order to promote substantial justice, the matter should not be decided on technicalities. After all, Rules of limitation are not meant to destroy the rights of parties and the law is only to safe guard the rights and to protect the substantive rights.

9. In view of the same, the Civil Revision Petition has to be allowed and accordingly, the same is allowed. All other objections raised by the petitioners/respondents can be raised before the trial Court. The trial Court shall proceed after considering all the objections raised by both the sides and pass appropriate orders. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

30.09.2020

asi/ms

To

The XV Assistant Judge,
City Civil Court, Chennai.

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M.GOVINDARAJ, J.

asi/ms



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and C.M.P.No.12871 of 2019

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