

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2020

THE HON'BLE MS. JUSTICE P.T.ASHA

A.No.7506 of 2018
in

C.S.No.418 of 2013

P.Kuppa Bai
W/o.Parthasarathy,
Plot No.5, 55/26,
Thiruvengadam Street,
Periamedu,
Chennai-600 003

..Plaintiff

-Versus-

1. M.Sumathi
W/o, C.Murugan
No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

2. S.Arumugam
No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

3. A.Arumugam
No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

4. P.Bakthavachalam
No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

5. Subramanian

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

6. T.Arumugam

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

7. Ramasamy

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

8. Selvakumar

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

9. M.Pandurangan

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

10. Krishnamoorthy

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

11. V.Narayanasamy

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

12. C.Akilandam

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

13. M.Thandavamoorthy,

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

14. Kannan

Representing for Nehru Street, Slum Area Resident,

No.57/10, Nehru Street,
Choolaimedu, Chennai-600 094.

A.No.7506 of 2018:

Application praying that this Hon'ble Court be pleased to condone the delay of 928 days in filing the application to set-aside the ex-parte decree dated 06/11/2015 in C.S.No.418 of 2013.

This Application coming on this day before this court for hearing, the Court made the following order:

Reserved on : 05.11.2020

Delivered on : 11.11.2020

The application for condoning the delay of 928 days in filing the application to set aside the ex parte decree dated 06.11.2015 in C.S.No.418 of 2013 has been filed by the defendants 1, 2, 4, 10, 12 to 14.

2. The suit C.S.No.418 of 2013 has been filed by the 1st respondent herein for a declaration of her title to the suit property and for recovery of possession, permanent injunction restraining the defendants from creating third party rights in respect of the suit schedule property and also for damages for use and occupation.

3. The 1st respondent would submit that the suit property which is an extent of 2160 Sq.ft bearing plot No.5, Choolai Medu, Kodambakkam, Chennai in Puliur Village was purchased under auction sale pursuant to a

decree dated 06.05.1972 passed by the VII Assistant City Civil Judge in O.S.No.1570 of 1966. Thereafter, the plaintiff's vendor had been issued a sale certificate dated 21.07.1976. The 1st respondent had purchased the property under a registered sale deed dated 31.05.1976. The 1st respondent would submit that from the date of purchase, she is in possession and enjoyment of the same. The suit property was part of a larger extent of land measuring about 8 grounds. This larger extent was divided into plots by the Advocate Commissioner appointed in O.S.No.1570 of 1966.

4. The 1st respondent would submit that the applicants and the other respondents had encroached into the suit property and the adjacent areas. She would further contend that, pursuant to the representation given by her and adjacent land owners to the Corporation, the Corporation had issued notices to the encroachers for demolishing the illegal construction put up by them. These encroachers had challenged the said application by filing Writ proceedings and this Court was pleased to dispose of all the Writ Petitions with a direction that the Corporation shall take action only after following due process of law. Thereafter, these encroachers had filed Writ Petition in W.P.No.6332 of 2006 to redevelop the schedule property as a slum area under the provisions of the Tamil Nadu Slum Area Improvement and Clearance Act, 1971, herein after called the Act.

5. The 1st respondent would submit that, she has filed her counter to the same and this Court had directed the applicants to submit a representation to the authority constituted in this regard. This order was challenged by the 1st respondent by filing Writ Appeal in W.A.No.481 of 2012. The appeal was also disposed of with a direction that all the defence should be raised before the concerned authority. It is in this background that this suit has been filed in order to establish the plaintiff's right over the property.

6. Since the applicants had not entered appearance in the suit or filed their written statement, they were set ex parte on 28.10.2014 and an ex parte decree was passed on 06.11.2015. The applicants have come forward with this application to condone the delay of 928 days in filing the application to set aside the ex parte decree and in the affidavit filed in support of the same they would submit that the applicants and the adjacent owners numbering about 88 families were in possession of the slum area and originally the 1st respondent along with the others had filed O.S.No.7911 of 2007 before the XVIII Assistant City Civil Court, Chennai and the said suit was contested by the applicants and the others and after the cross examination of the plaintiff side witness, the 1st respondent and others had withdrawn the suit

7. Thereafter, each of the plaintiffs in O.S.No.7911 of 2007 have filed separate suits and the applicants herein are parties in C.S.No.433 of 2013 as well as the instant suit. The applicants would submit that they had handed over the summons to their counsel and they have been contesting the suit C.S.No.433 of 2013 and have filed their written statement. Further, it appears that by an oversight the learned counsel had not entered appearance in the instant suit as a result of which an ex parte decree came to be passed. This is only on account of the illiteracy and the ignorance of the applicants who however had been diligent in handing over the summons to the learned counsel along with the vakalat. The applicants would submit that they came to know about the ex parte decree only when they received notice in the execution proceedings filed by the decree holder in E.P.Nos.75 and 76 of 2017. Immediately the applicants have come forward with the instant application to set aside the ex parte decree. However, in the interregnum there is a delay of 928 days.

8. The 1st respondent has filed a counter denying the averments contained in the affidavit filed in support of the application and submit that the delay is 1721 days since the applicants had been set ex parte even as early as in the year 2014.

9. The 1st respondent would submit that the only attempt on the part of the applicants is to grab the property belonging to the 1st respondent. The 1st respondent would submit that the reasons given in the affidavit filed in support of the condone delay petition was false and the contentions of the applicants that they had come to know about the ex parte decree all of a sudden is totally unbelievable. The 1st respondent would further submit that the suit property is not a slum area but a patta land. The applicants, according to the 1st respondent were attempting to illegally enter into the property of the 1st respondent.

10. The learned counsel for the applicants would reiterate the contentions made in the affidavit filed in support of the condone delay petition and would submit that the applicants have been fighting the case right from the year 2007 when the suit O.S.No.7911 of 2007 was filed before the City Civil Court. The said suit had reached the Trial stage and after the plaintiff side witness had been cross examined in detail, the 1st respondent chose to withdraw that suit since substantial defence has been raised in that suit by the applicants herein. The present suit has been filed after the withdrawal of the earlier suit in the year 2013. The applicants have also made necessary representation to the concerned authority as directed by

is still pending. The learned counsel would further argue that the applicants are also the parties in the suit C.S.No.433 of 2013, which suit they are contesting and therefore there was no ulterior motive for not appearing in the instant suit and the non - appearance is only on account of an oversight. In fact, the applicants had given the summons received by them in the suits to their counsels. Therefore, no malafide can be attributed to the applicants.

11. Per contra Mr.A.Thiagarajan, learned Senior Counter appearing on behalf of the learned counsel for the 1st respondent would submit that the 1st respondent had filed a Section 47 application in the execution petition which was dismissed by the learned master by order dated 25.07.2019 as against which an appeal had been filed by petitioners in A.No.5879 of 2019 before this Court and after hearing parties the appeal petition was also dismissed by order dated 24.10.2019, which has now become final.

12. The learned senior counsel would submit that in the application filed under Section 47 of the Code of Civil Procedure, the applicants have categorically stated that they are not in occupation of plot no.5. He would further submit that it is on basis of this admission that Section 47 had been dismissed. He would therefore submit that having taken a stand that they are not in occupation of plot no.5, the applicants cannot blow hot and cold by filing this application to condone the delay of 928 days in filing the application to set aside the ex parte decree. He would therefore submit that

the application lacks bonafide and should therefore be dismissed.

13. Heard the learned counsel, learned senior counsel and perused the papers.

14. It is an admitted fact that the applicants herein have been contesting the suit filed by the 1st respondent and others from the year 2007 till its withdrawal on 28.09.2012. It is also an admitted fact that the application filed by the applicants and others to declare the suit schedule property and the adjacent property as a slum area is pending consideration of the concerned authority which has been filed pursuant to the directions of this Court in Writ Petition No.28723 of 2006, which is also confirmed in Writ Appeal No.481 of 2012 . It is also not in challenge that the applicants herein are contesting the connected suit in C.S.No.433 of 2013, wherein they have also filed their written statement as early as on 22.12.2016, in which the applicants have categorically stated that the property subject matter of C.S.No.433 of 2013 and the adjacent lands which includes the property subject matter of the instant suit is a slum area where the slum dwellers including the applicants have been in possession for several decades. The instant suit is filed for a declaration and recovery of possession whereby the 1st respondent acknowledges possession of the property with the applicants and the other respondents.

15. The fact that a comprehensive suit was filed in the year 2007 by the owners of all the lands in and around the suit property would lend credence to the statement of the applicants that they have been hotly contesting the claim of the 1st respondent.

16. Therefore, I am of the view that if the delay is not condoned, a substantial right pleaded by the applicants would be prejudiced more particularly when their representation for converting the lands into a slum area is pending before the authorities. Sufficient reasons for setting aside the ex parte order has also been made out. The merits or otherwise of the claim of the applicants can be tested only during the Trial. In these circumstances, the interest of justice would be sub served if the delay of 928 days in filing the application to set aside the ex parte decree in C.S.No.418 of 2013 dated 06.11.2015 is condoned. The delay is accordingly condoned. The Registry is directed to number the application filed for setting aside the ex parte decree and post the matter on 08.12.2020.

Sd./-P.T.A.J
11.11.2020

//Certified to be true copy//

Dated at Madras this the day of 2020.

COURT OFFICER(O.S.)

From 25th day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

JJ 01/12/2020