



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.02.2020

CORAM:

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THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

C.R.P. (NPD) (MD)No.1302 of 2013

and

M.P. (MD)No.2 of 2013

1.N.S.Subramanian
2.Minor N.S.Karthick
3.N.S.Vivek ...Petitioners/Petitioners/Defendants 1 to 3

(R3 is declared as Major and the first petitioner is discharged from the guardian vide

Court order dated 14.02.2020 made in C.M.P. (MD)No.12551 of 2016)

vs.

1.N.S.Devadoss
2.N.D.Madan Babu
3.A.H.Usha
4.Abdul Lathif
5.Sulthan ..Respondents/Respondents/Plaintiffs 1 & 2/
Defendants 4 to 6

PRAYER: The Civil Revision Petition is filed under Section 115 of Civil Procedure Code, against the fair and decretal order passed in I.A.No.95 of 2012 in O.S.No.167 of 2011, dated 15.04.2013 on the file of the Principal Subordinate Judge, Madurai.

For Petitioners : Mr.K.C.Gurusamy
For R1 and R2 : Mr.K.K.Balaram
For R3 : Mr. C.Kishore
For R4 and R6 : Given up

ORDER

The first defendant in O.S.No.464 of 2004 on the file of the Additional District Court, Fast Track Court No.1, Madurai, which is renumbered as O.S.No.167 of 2011 on the file of the Principal Sub Court, Madurai is the revision petitioner.

2. The suit in O.S.No.167 of 2011 was laid by the plaintiffs seeking partition and separate possession of their half share in the suit property. The first petitioner herein was arrayed as first defendant and his two minor sons were arrayed as defendants



2 and 3, while the defendants 4 to 6 were alinees. Since the first defendant, who is the father of the minor sons did not appear, despite receipt of notice, a Court guardian was appointed for the minors. The Court guardian filed written statement. The first defendant remained exparte.

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3. The learned Additional District Judge passed a decree on 28.12.2007 after setting the defendants 1, 4 and 5 exparte. Recording appearance of the Court guardian for the defendants 2 and 3 and the learned counsel for the sixth defendant, on the basis of the evidence available, the trial Court proceeded to pass a decree in the suit. Considering the said decree as an exparte decree, the first defendant filed applications seeking condonation of delay in filing petitions to set aside the exparte decree and for setting aside the exparte decree. The said applications were rejected even without numbering.

4. The said order was challenged before this Court in C.R.P. (MD)Nos.2454 and 2455 of 2010 and C.M.A.(MD)No.1652 of 2010. This Court by order dated 01.12.2010 allowed the civil revision petitions and the civil miscellaneous appeal on the conclusion that the decree passed against the first defendant is an exparte decree. While doing so, the HONOURABLE MR.JUSTICE V.RAMASUBRAMANIAN had observed as follows:-

"...

8.However, I am of the view that if an application is filed by a person who was set exparte, along with another person who is said to have contested the suit, the Court could have directed the petitioner to file an application only on his behalf and not on behalf of the others. There was no dispute that the petitioner herein suffered the exparte decree. Even if his application is taken to be not maintainable on behalf of the minor children, the Court had the power to either to return the application for representation on behalf of the petitioner alone or to restrict the application by judicial order only to the benefit of the petitioner herein.

....."

5. The civil revision petitions and the civil miscellaneous appeal were allowed with a direction to the trial Court to number the unnumbered applications and dispose of the same. Thereafter, the applications for condonation of delay in seeking to set aside the exparte decree was numbered as I.A.No.95 of 2012. The delay was only 70 days.

6. The learned Principal Subordinate Judge, Madurai, who heard the applications after numbering, concluded that the decree is one on merits and hence, the same cannot be set aside. In view of the



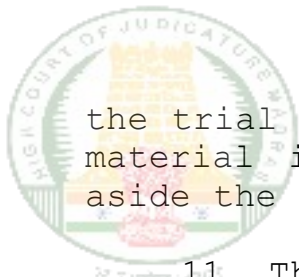
finding that the decree is one on merits, the learned Subordinate Judge refused to condone the delay, resulting in dismissal of the application in I.A.No.95 of 2012. Aggrieved, the defendants 1 to 3 have come up with this civil revision petition.

7. I have heard Mr.K.C.Gurusamy, learned counsel for the petitioners, Mr.K.K.Balaram, learned counsel for the first and second respondents and Mr.C.Kishore, learned counsel for the third respondent. The fourth and fifth respondents have been given up, since they remained *exparte* before the trial Court.

8. The learned counsel for the petitioners would contend that the learned Principal Subordinate Judge was not right in concluding that the decree is one on merits, even after specific observations made by this Court while disposing of the civil revision petitions and the civil miscellaneous appeal by order dated 01.12.2010. He would further contend that in any event, the decree passed without any evidence on the side of the first defendant, can only be treated only as an *exparte* decree insofar as he is concerned. It does not matter, whether the other defendants had let in evidence or not. He further pointed out that the decree, which is one for partition, is indivisible and hence, the entire decree has to be set aside, if the Court satisfied by the reasons assigned by him for the delay and non appearance.

9. The power of Courts under Order 17 Rule 1 and 2 of the Civil Procedure Code are clearly settled. If a party fails to appear and the evidence or substantial evidence of such party is already on record, the Court has the power to proceed with the suit on merits. But if evidence is not already on record, the Court has to proceed against him / her only *exparte* under Order 9 of the Code of Civil Procedure.

10. In this case, the Court has proceeded against the first defendant *exparte* and the decree against the first defendant is necessarily an *exparte* decree. Though other defendants had contested, that would not make the decree a contested decree as against the first defendant. At the best, it can be stated that the decree can be set aside only against the first defendant and not against the other defendants. Even that is possible happen, only if the decree is divisible. This being the decree for partition and indivisible decree, if the Court is convinced with the reasons given by the first defendant for his non appearance, the entire decree has to be set aside. After this Court has held that the decree is an *exparte* decree, the trial Court had no business to hold that the decree is one on merits. The trial Court has not considered the reasons assigned by the first defendant for the delay. In my considered opinion, the action of



the trial Court is to say the least irresponsible and suffers from material irregularity. Therefore, I have no hesitation to set aside the order of the trial Court.

11. The learned counsel for the respondent would contend that since I.A.No.94 of 2012, which was filed under Order 9 Rule 13 of the Civil Procedure Code seeking to set aside the decree and dismissed as consequence of refusal of condone the delay, was appealed and the appeal having been withdrawn, the correctness of the order passed in I.A.No.95 of 2012 cannot be gone into.

12. I do not think that he is right in his submissions. Order in I.A.No.94 of 2012 is a consequential to the order made in I.A.No.95 of 2012. The principle of the law is that if the basis goes, the consequence disappears. A Hon'ble Division Bench of this Court in **R.Vaidyalingam and eight others vs. Madras Secretariat cooperative House Building Society Ltd. and another** [1995-1-L.W. 655] had gone into the question of dependant orders and has held that if the delay is condoned, the other applications, which were consequentially dismissed, will automatically stand restored. In doing so, the Hon'ble Division Bench had observed as follows:-

".....

5.In this matter, the argument of the learned counsel for the appellant / petitioners is that the order dismissing the appeal as abated is only a dependant order and it was consequential to the order dated 17.03.1992 whereby the City Civil Court dismissed the application for condonation of delay of 30 days in seeking to set aside the abatement in bringing the legal representatives on record. Learned counsel referred to the judgment of the Supreme Court in *G.Ramegowda v. Special Land Acquisition Officer, Bangalore* (AIR 1988 S.C.879=1989-1-L.W.580). In that case, appeals were filed in a land acquisition matter before the High Court, but after the expiry of the period prescribed for appeals. Applications for condoning delay were filed under Section 5 of the Limitation Act. The High Court condoned the delay and the order condoning delay was challenged before the Supreme Court. By the time the Supreme Court took up the appeal before it, the main appeals were disposed of by the High Court and an argument was advanced that the main appeals having been disposed of, nothing survived in the appeals before the Supreme Court. The said argument was rejected by the Supreme Court holding that the orders passed in the main appeals were only dependent and if the appeals before the Supreme Court were allowed, the orders in the appeals made by the High Court would have been set aside consequently.



13. Therefore, the objection of the learned counsel on the ground that because of the order in I.A.No.94 of 2012, this Civil Revision Petition would become infructuous cannot be accepted. Therefore, this Civil Revision Petition is allowed and the order of the trial Court made in I.A.No.95 of 2012 is set aside and the same is remitted to the trial Court to be disposed of in accordance with law. Conceding the position that the decree is an exparte decree, the trial Court is directed to consider the reasons assigned by the petitioners for the delay in filing application to set aside the same. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar ()

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Sub Assistant Registrar(CS)

To

The Principal Subordinate Judge, Madurai.

+1 CC to M/s.C.KISHORE, Advocate (SR-8945[F] dated 27/02/2020)

+1 CC to M/s.K.C.GURUSAMY, Advocate (SR-8615[F] dated 27/02/2020)

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26.02.2020

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