



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.07.2020

CORAM

THE HON'BLE MR.JUSTICE **S.S.SUNDAR**

C.R.P. (PD) (MD)No.1001 of 2018

and

C.M.P. (MD)No.4354 of 2018

WEB COPY

1.Manorathi

2.Rani

3.Revathi

: Petitioners

.. Vs ..

George

: Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order, dated 19.02.2018 passed in E.P.No.3 of 2018 in O.S.No.291 of 2012 on the file of the District Munsif-cum-Judicial Magistrate Court, Bhoothapandi.

For Petitioners :Mr.V.Meenakshi Sundaram

for Mr.D.Nallathambi

For Respondent :Mr.K.P.Narayana Kumar

ORDER

This Civil Revision Petition is directed against the order passed by the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi, in E.P.No.3 of 2018 in O.S.No.291 of 2012, dated 19.02.2018.

2.The brief facts that are necessary for the disposal of this Civil Revision Petition are as follows:

3.The petitioners herein are the defendants in the suit in O.S.No.291 of 2012 on the file of the District Munsif-cum-Judicial Magistrate Court, Bhoothapandi. It is admitted that the petitioners are the sisters of respondent. It is also admitted that a preliminary decree was passed in the suit on 10.09.2007. The appeal preferred by the revision petitioners as against the preliminary decree was also dismissed on 10.01.2009. Thereafter, the revision petitioners have filed a second appeal with the delay and the second appeal is also pending in SR stage. In the meanwhile, the respondent filed a final decree application in I.A.No.172 of 2012. After notice to the revision petitioners, it appears that, an ex parte final decree was passed on 08.11.2017. Thereafter, an execution petition was filed by respondent in E.P.No.3 of 2018 in O.S.No.291 of 2017 for delivery of property, that was allotted to the respondent herein in the ex parte final decree. Thereafter, delivery was ordered on 20.01.2018. When the matter was posted for recording delivery, the revision petitioners appeared before the Court below as party-in-person with the petition to set aside the ex parte final decree along with the petition to condone delay. The Executing Court returned the delay petition and the petition to set aside the ex parte final decree and recorded delivery. The learned Judge seems to think that the petitions filed by the revision petitioners to set aside the ex parte final decree and the petition to condone the delay will be infructuous, once delivery is ordered



and recorded pursuant to the *ex parte* final decree. As against the order in E.P.No.3 of 2018 in O.S.No.291 of 2012, the revision petitioners have preferred the above revision.

4.The learned Counsel for the petitioners submitted that the lower Court ought to have allowed the petition to condone the delay of 72 days in filing a petition to set aside the *ex parte* final decree and the petition to set aside the *ex part* final decree and granted stay of proceedings, till such time, the petitions are disposed of on merits. The learned Counsel for the petitioners further stated that when ever an application is filed to set aside the *ex parte* decree, the lower Court is expected to dispose of the same before ordering delivery in the execution petition. The lower Court has got ample power to restore *status-quo ante*, if the petitioner is able to show sufficient cause for the delay and for the non-appearance on the date when the *ex parte* final decree was passed. He further submitted that the lower Court failed in exercising its discretionary power vested in it, with a erroneous understanding of the legal position. The learned Counsel for the petitioners further submitted that the delivery was not effected and the report of the Amina was only by a paper delivery.

5.Both Counsels admitted that this Court appointed an Advocate Commissioner to find out whether the property was delivered either actually or symbolically. The learned Advocate Commissioner has also filed a report stating that a construction has commenced in a smaller extent of 1 cent. In effect, though the construction is not yet completed, the respondent has taken physical possession of the portion of the property, which is now under construction. In these circumstances, this Court has to pass necessary orders to protect the interest of parties.

6.The revision petitioners have filed a second appeal, which is yet to be numbered. The preliminary decree, as on date, is not stayed by any Court. In such circumstances, the respondent/decreed holder is entitled to proceed further to get a final decree and then get allotment as per the final decree. In the present case, a final decree application was filed in 2012. Despite notice, the revision petitioners did not appear and therefore, an *ex parte* final decree was passed on 08.11.2017. It is admitted that the revision petitioners have filed an application to set aside the *ex parte* final decree along with the petition to condone the delay of 72 days on 19.02.2018. If these petitions are allowed on merits, the final decree itself will fall to ground and the revision petitioners can ask for fresh allotment, if the allotment, which is made earlier, is inequitable or likely to cause serious prejudice or injustice to the revision petitioners. Therefore, the petitions to set aside the *ex parte* final decree and the petition filed under Section 5 of the Limitation Act have to be given preference.

7.The learned Judge has casually returned the applications only on the ground that those applications have been filed after the delivery was ordered and delivery was recorded. The approach of the learned Judge cannot be appreciated, having regard to the admitted facts. Hence, this Court is inclined to entertain this Civil Revision Petition, even though delivery was recorded and the



respondent has put up a construction in the property allotted to him in the final decree proceedings. The impugned order is erroneous and against settled principles of law. Hence the order passed by the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi, passed in E.P.No.3 of 2018 in O.S.No.291 of 2012, dated 19.02.2018, is set aside and the matter is remitted to the lower Court for fresh disposal. The learned District Munsif-cum-Judicial Magistrate, Bhoothapandi, is directed to consider and pass orders in I.A.No.90 of 2018 in I.A.No.172 of 2012 in O.S.No.291 of 2012 and the connected application filed by the revision petitioners to set aside the *ex parte* decree within a period of eight weeks from the date of receipt of a copy of this order. Depending upon the outcome of the petitions filed by the revision petitioners in I.A.No.90 of 2018 and the petition to set aside the *ex parte* decree, the lower Court is further directed to pass fresh orders in E.P.No.3 of 2018 in O.S.No.391 of 2012.

8.Since delivery has been recorded and delivery has been effected as per the Court proceedings, the possession of the respondent has to be presumed. However, if the revision petitioners are able to succeed in the applications filed by them before the lower Court to set aside the *ex parte* final decree and if the final decree passed earlier is set aside, the petitioners will be given an opportunity to participate in the final decree application which leads to fresh final decree. Hence, the respondent cannot be permitted to put further construction, that will prejudice the revision petitioners. Accordingly, the respondent is directed to maintain status-quo and not to put up any construction in the property allotted to him pursuant to the *ex parte* final decree, dated 12.02.2011. It goes without saying that the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi, is directed to dispose all the petitions uninfluenced by any of the observations or the nature of order passed by this Court.

9.In fine, the Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AS)

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Sub Assistant Registrar(CS)

cmr

To

The District Munsif-cum-Judicial Magistrate,
Bhoothapandi.

+1 CC to M/s.D. NALLATHAMBI, Advocate (SR-13332[F] dated 29/07/2020