

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.02.2021

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(NPD) No.1760 of 2015
and M.P.No.1 of 2015

P.Babu

... Petitioner

Vs.

1. P.Kumar

2. P.Velu

... Respondents

Prayer :- Civil Revision Petition is filed under Section 115 of C.P.C., to set aside the fair and decreetal order dated 06.02.2015 passed in I.A.No.13744 of 2014 in O.S.No.785 of 2010 on the file of the learned II Assistant City Civil Judge, Chennai.

For Petitioner : Mr.Elizabeth Ravi

For Respondents : No appearance

ORDER

This Civil Revision Petition has been filed as against the fair and decreetal order dated 06.02.2015 passed by the learned II Assistant City Civil Judge, Chennai, in I.A.No.13744 of 2014 in O.S.No.785 of 2010, thereby dismissing the petition to condone the delay of 1505 days in filing

the application to set aside the exparte decree.

2. The petitioner is the defendant in the suit filed by the respondents for partition. The petitioner engaged his counsel and also filed his written statement. Thereafter he failed to appear before the trial Court and as such he set exparte and exparte order was passed on 22.06.2010. After the period of four years, the petitioner filed the present petition to set aside the exparte decree along with condone delay petition to condone the delay of 1505 days. The trial Court dismissed the above said petition as against which, the present Civil Revision petition.

3. Heard Mr.Elizabeth Ravi, learned counsel appearing for the petitioner. Though notice served and name printed in the cause list, no one is represented for the respondents either by person nor through counsel.

4. On perusal of the affidavit filed in support of the condone delay petition, the petitioner stated that he fell sick and he was suffering from jaundice. Therefore he could not be able to meet his counsel.

Thereafter he tried to contact his counsel. Unfortunately, the counsel who appeared on behalf of the petitioner changed his office and shifted to some other premises and therefore, the petitioner could not find his whereabouts. Therefore there was a delay of 1505 days in filing the application to set aside the exparte decree. Further revealed that when the petitioner received the notice from the final decree application filed by the respondents in I.A.No.6657 of 2014, the petitioner came to understand that the suit was decreed as exparte.

5. The learned counsel appearing for the petitioner relied upon the judgment reported in **2019 6 SCC 387** in the case of ***Bhivchandra Shankar More Vs. Balu Gangaram More and ors***, in which the Hon'ble Supreme Court of India held as follows :-

"19. It is pertinent to note that as per Section 97 CPC where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. The object is that the

questions decided by the court at the stage of passing preliminary decree cannot be challenged at the time of final decree. If no appeal had been preferred against the preliminary decree, the suit filed by the respondents-plaintiffs being a suit for partition, the appellant would be deprived of the opportunity in challenging the decree on merits. In the interest of justice, the appellant and respondents No.14 and 15 are to be given an opportunity to challenge the ex-parte decree dated 04.07.2008 on merits, notwithstanding the dismissal of their application filed under Order IX Rule 13 CPC."

Where any party aggrieved by a preliminary decree, he shall be precluded from disputing its correctness in any appeal, which may be preferred from the final decree. Therefore, the party would be deprived the right of challenging the decree on merits.

6. In the case on hand, the petitioner was set exparte and the preliminary decree was passed and only in the final decree application, he came to know about that the exparte preliminary decree was passed as

against him. Therefore, the petitioner may be given an opportunity to defend his case. In view of the above discussion, the order passed by the trial Court is perverse and liable to be set aside. Accordingly, the order dated 06.02.2015 passed by the learned II Assistant City Civil Judge, Chennai, in I.A.No.13744 of 2014 in O.S.No.785 of 2010, is hereby set aside, on condition that the petitioner shall pay a sum of Rs.5,000/- (Rupees five thousand only) each to the respondents herein, within a period of two weeks from the date of receipt of a copy of this Order failing which, the order passed by this Court will automatically stand cancelled.

7. With the above directions, this Civil Revision Petition stands allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

19.02.2021

Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order
rts

G.K.ILANTHIRAIYAN, J.

rts

To

1. The II Assistant City Civil Judge,
Chennai
2. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.



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