

IN THE HIGHCOURT OF JUDICATURE AT MADRAS

DATE: 13.08.2021

CORAM

THE HON'BLE MR.JUSTICE G.CHANDRASEKHARAN

**C.R.P.(NPD).No.1601 of 2021
and C.M.P.No.12450 of 2021**

M.Subbaiyan (Died)
1.Rajammal
2.Ponmani
3.Devi

...Petitioners

Vs.

P.Ponnammal

...Respondent

(Cause title accepted vide order of this Court made in C.M.P.No.11607 of 2021 dated 04.08.2021)

PRAYER: This Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order dated 06.08.2021 made in I.A.No.2 of 2020 in I.A.No.51 of 2017 in O.S.No.848 of 2012 on the file of the Sub-Ordinate Court, Mettupalayam.

For Petitioners : Mr.Sam Jayraj Hoaston for
M/s Sarvabhauman Associates

ORDER

This Civil Revision Petition has been filed, to set aside the order dated 06.08.2021 made in I.A.No.2 of 2020 in I.A.No.51 of 2017 in

O.S.No.848 of 2012 on the file of the Sub-Ordinate Court, Mettupalayam.

2.The case of the petitioners is that the respondent herein filed a suit for partition in O.S.No.848 of 2012. The defendant-Subbaiyan (deceased) filed written statement on 26.08.2013 and subsequently, because of his nonappearance before the trial Court, the suit came to be decreed exparte on 25.11.2016. There was a delay in filing the petition to set aside the exparte decree. Therefore, he filed a petition in I.A.No.51 of 2017 under Section 5 of the Limitation Act, to condone the delay of 209 days in filing the petition to set aside the exparte decree dated 25.11.2016 in the suit. Since both the parties were not present and also counter has not been filed in I.A.No.51 of 2017, the same has been dismissed for default on 06.02.2018.

3.As against the order dated 06.02.2018, the defendant has preferred a petition in I.A.No.2 of 2020, to condone the delay of 746 days in restoring the I.A.No.51 of 2017 under Section 5 of the Limitation Act.

4.The learned counsel for the petitioners would submit that the defendant-Subbaiyan (deceased) is aged person and he could not able to walk and therefore, he did not attend the Court regularly. It is also submitted that the case was originally filed before the Subordinate Court,

Coimbatore and then it has been transferred to Subordinate Court, Mettupalayam, which caused the delay in filing the petition. These are the reasons for the delay in filing the petition to set aside the exparte decree. He would further submit that the defendant was admitted in the hospital and filed the discharge summary dated 11.07.2018 and also the treatment record to show that he was not well. Further, the reasons stated by the defendant was not properly considered by the Court below.

5.Suit was filed by the respondent herein, who is the sister of the defendant, claiming partition of ½ share in the suit property. The said suit was filed on the premise that the suit property was an ancestral joint family property and thus it was decreed on 25.11.2016.

6.Perusal of the judgment shows that inspite of several opportunities given to cross examine the plaintiff, the defendant has not chosen to cross examine her and exparte decree was passed on 25.11.2016. Subsequently, the defendant has filed I.A.No.51 of 2017 with a prayer to condone the delay of 209 days in filing the petition to set aside the exparte decree under Section 5 of the Limitation Act, and the same has been dismissed for default on 06.02.2018. Even thereafter, it appears that the

defendant has not come out from deep slumber, filed a petition in I.A.No.2 of 2020 with a prayer to condone the delay of 746 days in filing the petition to restore the I.A.No.51 of 2017.

7.The learned trial Judge after considering the submissions of both side found that the defendant was admitted in the hospital only for 2 days ie., from 18.06.2018 to 19.06.2018 and the medical records did not support his absence on the date of hearing before the trial Court and for the subsequent dates. Further the delay is huge one and it has not been properly explained. Thus, the learned trial Judge dismissed the petition on 06.08.2021.

8.The aforesaid facts shows that the defendant has filed the written statement and then deliberately avoided cross examination of the plaintiff, even though he has been provided with sufficient opportunities and allowed the suit to be decreed exparte. Thereafter, he filed a petition to set aside the exparte decree in I.A.No.51 of 2017, with a delay of 209 days. Not vigilant enough to prosecute the petition, he allowed that petition to be dismissed for default. Again, he came up with a petition to restore the I.A.No.51 of 2017 with a delay of 746 days in I.A.No.2 of 2020. The

attitude and conduct of the defendant-Subbaiyan shows that he is not at all interested in prosecuting the case on merits, but his intention was only to drag on the proceedings by filing a petition to set aside the exparte decree, allowing it to be dismissed for default and filing another petition to restore it.

9.The learned trial Judge has considered all the relevant aspects, medical records and recorded her findings that the medical records have not substantiated the case put forth for the absence and huge delay. This Court completely agrees with the reasoning given by the learned Subordinate Judge, Mettupalayam, and therefore order dated 06.03.2021 in I.A.No.2 of 2020 in I.A.No.51 of 2017 in O.S.No.848 of 2012 is hereby confirmed and the Civil Revision Petition is dismissed. However, no order as to costs. Consequently connected miscellaneous petition is closed.

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Index:Yes/No

Internet:Yes/No

Speaking order/Non-speaking order

G.CHANDRASEKHARAN, J.,

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To
The Subordinate Judge
Mettupalayam.



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