

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.A.No.3151 of 2019 & C.R.P.No.1895 of 2019

C.M.P.No.12436 of 2019

1.S.Thyagapari

2.S.Krishnaveni

...Petitioners in both petitions

vs.

1.A/M.Kayarohanaswamy Neelayathatchi
Amman, temple, Nagapattinam rep.by
its Executive Officer, having his office in
Neela Sannathi Street,
Nagapattinam Town and Munsif.

2.A.Durai @ Manavazhagan

3.Duraisingam

4.K.Jadatharan

5.K.Deiventhran

6.M.Rajeswari

7.V.Ramachandran

8.A.Sanathi

9.K.T.Arasu

10.Jakulin Anbumani

11.Vijaya

12.K.Subbaiya

13.R.Kumar

14.A.Kannan

15.T.Vairavanathan

16.R.Balaji

17.K.Nedumaran

18.A1.Alamelu

19.Latha @ Suthanthiraselvi

20.C.Anitha

21.Kanmani

22.R.Vanitha

23.T.Thangakathiravan

24.S.Sivasankar

25.R.Sowmiya

26.T.Rajeswari

27.K.Srinivasan

28.P.Kalaiselvi ... Respondents in both petitions

PRAYER IN C.M.A.No.3151 of 2019 : Civil Miscellaneous Appeal is filed under Order XLIII Rule 1(d) of Civil Procedure Code, to set aside the Fair and Decreetal Order passed in I.A.No.73 of 2018 in O.S.No.24 of 2010 passed by the learned District Judge, Nagapattinam dated 26.03.2019 and allow the Civil Miscellaneous Appeal.

PRAYER IN C.R.P.No.1895 of 2019 : Civil Revision Petition is filed under Section 115 of C.P.C, to set aside the fair and decreetal order passed in I.A.No.92 of 2017 in O.S.No.24 of 2010 passed by the learned District Judge, Nagapattinam dated 26.03.2019 and allow the Civil Revision Petition.

For Petitioner : Mr.A.Navaneethakrishnan,
Senior counsel
for M/s.I.David Singh

For Respondents : Mr.M.S.Palaniswamy for R1
No-appearance for RR 2 to
5,7,10,15, 16, 18, 20 to 23, 24, 25 & 28
Not ready in notice-RR6, 8, 9,
11 to 14, 17, 19 & 26, 27

C O M M O N O R D E R

The Civil Miscellaneous Appeal on hand is filed against the Fair and Decreetal Order dated 26.03.2019 passed in I.A.No.73 of 2018 in O.S.No.24 of 2010.

2. The Civil Revision Petition is filed challenging the fair and Decreetal Order dated 26.03.2019 passed in I.A.No.92 of 2017 in O.S.No.24 of 2010.

3. The First respondent/A/M.Kayarohanaswamy Neelayathatchi Amman Temple, Nagapattinam represented by its Executive Officer is the plaintiff in the suit and the suit was instituted to declare that the registered documents are null and void and deliver the possession to the temple. The suit was adjudicated elaborately by the learned District Judge, Nagapattinam. The petitioners in the present petitions are the defendants 2 and 3 in the original suit. Nearly about 29 defendants are impleaded as the parties in the suit, as the plaintiff contended that the defendants are illegally possessing the suit property and so many documents were also created against the temple property. Thus, the Executive Officer of the suit property was constrained to file the suit for declaration and deliver the possession. Notice was served to all the respondents including the petitioners who are the defendants 2 and 3 in the original suit. The suit was adjudicated on merits and the other defendants had participated in the process of trial and the suit was decreed in favour of the plaintiff.

4. The learned Senior Counsel appearing on behalf of the petitioners mainly contended that the petitioners/defendants 2 and 3 had not filed written statement and they were set ex-parte. Therefore, an opportunity is to be provided to the petitioners to contest the case by filing written statement and to elicit evidence. The Interlocutory Application in I.A.No.92/2017 was filed to condone the delay of 27 days in filing the petition to set aside the ex-parte decree dated 26.04.2017 and another application in I.A.No.73/2018 was filed to set aside the ex-parte decree dated 26.04.2017 by the petitioners/defendants 2 and 3. Both applications were heard together by the learned District Judge, Nagapattinam and the orders were passed.

5. The learned Senior Counsel appearing on behalf of the petitioners mainly contended that the delay of 27 days in filing the petition to set aside the ex-parte decree as a condonable delay. Therefore, the trial Court ought to have allowed the same as the delay is not enormous. The learned Senior Counsel is of the opinion that the properties are not belonging to the plaintiff's temple and the petitioners/defendants 2 and 3 are having a fair case of success. Therefore, they must be provided with an opportunity to contest the case by filing the document and adducing evidence before the trial Court. The reasons stated for not contesting the case by the petitioners are that they

shifted to Chennai for carrying out their business. Therefore, they could not be available at Thiruvavarur. The mother of the petitioners is also aged and was not having adequate knowledge about the legal proceedings and they could not able to follow up the developments made in the suit. Therefore, they had not contested the case. Thus, the present appeal is filed in order to get an opportunity to contest the case before the trial Court.

6. The learned counsel appearing on behalf of the first respondent objected the contention by stating that the defendants are the encroachers, more specifically, the petitioners are sold the properties in favour of the third parties. It is contended that the entire suit property belongs to the temple and stands in the name of deity. Thus, the transactions are null and void and all the defendants are illegally possessing the temple properties. The trial Court adjudicated the issues on merits with reference to the documents and evidence available and several opportunities were provided to the petitioners. It is further contended that on behalf of the petitioners, one learned Advocate has got into the box and gave evidence. All such illegalities or irregularities were committed, in order to grab the temple properties. The learned counsel for the first respondent reiterated that when the petitioners were set ex-parte on 22.03.2011, the application to set aside the ex-parte decree was not pursued and the judgment and decree in O.S.No.24/2010 was delivered on 26.04.2017 after a lapse of six years. Thus, the conduct of the petitioners is self-evident. After the dismissal of the suit, in order to prolong and protract the issue, the applications are filed to condone the delay and set aside the ex-parte decree.

7. It is pertinent to note that the petitioners were set ex-parte on 22.03.2011 and the decree was passed in the year 2017. Thus, the reasons stated by the trial Court in this regard are to be considered. Paragraph No.7 of the judgment of the trial Court is extracted hereunder:

"The petitioners admit in their affidavit that they have been kept quiet as they have been given legal advice that there was nothing survives against these petitioners. The petitioners are the vendors and the respondents 2 to 28 are the purchasers of the temple properties illegally. Since the petitioners have sold the suit properties to the other respondents 2 to 28, they have wilfully failed to participate in the suit. Now as rightly argued by the learned counsel for the 1st respondent at the instance and instigation of the respondents 2 to 28 who suffered a decree on merits the present petition has been filed with a view to delay the execution of

the decree and nothing else. The provisions of Under Section 5 of Limitation Act and Order 9 Rule 13 of C.P.C should not be allowed to be invoked by unscrupulous persons like these petitioners. If really the petitioners had any interest in pursuing the suit they ought to have taken steps before passing of the decree on merits by this Court. Most of the respondents are practising advocates at Nagapattinam. By flouting the directions of the Honourable High Court the petitioners have deceitfully grabbed away the temple properties and sold it to the respondents 2 to 28, without the knowledge of the 1st respondent temple. The Honourable High Court has directed as per its order in C.R.P.No.408/1983 to sell the suit properties in a open tender to be called for by the District Judge, Nagapattinam. The petitioners in connivance with some advocates of this town have suppressed the directions of the Honourable High Court and obtained permission for exchange of the temple properties for the petitioners' other properties. The said permission granted by this Court dated 31.10.2000 has been challenged and on merits, it has been declared as the said order of this Court is null and void. Even now the petitioners have no interest in pursuing the matter further. If really the petitioners have any interest over this matter they would have entered into the box and they will not simply asked their counsel to stand and depose on their behalf. If this trend of examining the advocate who is appearing for the parties are allowed, then the ends of justice will be defeated as it causes serious prejudice to the other side. The 1st respondent temple, who obtained a decree after a serious contest against respondents 2 to 28, deprived of its right of cross-examination of the petitioners. Therefore, absolutely there is no merits in this petition and the same is liable to be dismissed.

8. Perusal of the decree dated 26.04.2017 reveals that the most of the defendants filed their written statements and all the brief averments made in the affidavit are extracted in O.S.No.24 of 2010. Eight issues were framed and all the issues were independently considered and discussed by the trial Court in its judgment. In view of the fact that the judgment and decree passed in the suit is a considered decree and now the petition to set aside the ex-parte decree is dismissed, this Court is of the considered opinion that the present case cannot be treated as a routine case where the courts can take a lenient

view in the matter of restoration of the suit which was dismissed on default or the order of the set aside is passed. In normal circumstances, restoration of the suit which was dismissed on default or to set aside the ex-parte decree will be done by taking a liberal view. However, in certain exceptional circumstances, where those facts are established regarding the motive of the parties to prolong and protract the issues, then the Courts cannot come into rescue of those litigants for the purpose of prolonging the suit itself. Parties are expected to be vigilant and genuine in contesting the litigation. If they made an attempt to work out their remedy in such a manner by prolonging the issues, the Courts cannot assist or come into rescue of those litigants. In the present case, the petitioners were set ex-parte in the year 2011 itself and the suit was decreed in the year 2017. For six years, the petitioners were waiting to contest the suit by filing the written statement. This apart, the suit was decreed on merits. All other defendants filed their written statement and the trial Court considered all these things and decreed the suit in favour of the plaintiff. Under these circumstances, the trial Court arrived a conclusion that the application to set aside the ex-parte is filed with some motive and therefore, there is no reason to consider the petition for the purpose of setting aside the ex-parte order and accordingly, dismissed the petition. The reason furnished for rejection of the petition by the trial Court is based on sound legal principles and there is no infirmity as such. Accordingly, the Fair and Decreetal Order dated 26.03.2019 in I.A.No.92 of 2017 in O.S.No.24 of 2010 and I.A.No.73 of 2018 in O.S.No.24 of 2010 stand confirmed and consequently C.M.A.No.3151 of 2019 and C.R.P.No.1895 of 2019 stand dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

ssb

To
The District Judge, Nagapattinam.

+2cc to Mr.I.David Singh, Advocate, S.R.No. 1743 & 1744
+2cc to Mr. M.S.Palaniswamy, Advocate, S.R.No. 1700

C.M.A.No.3151 of 2019 & C.R.P.No.1895 of 2019

SR II(CO)
GN(18/02/2021)