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CRP (MD).No.994 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.07.2021

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.R.P (MD) .No.994 of 2021

and

C.M.P (MD) No.5659 of 2021

and

Caveat No.472 of 2021

N.Hariraman (Died)

1.Hemalatha

2.Sudharsan

3.Subhalakshmi

: Petitioners/3rd Party/3rd Party

Vs.

1.N.Ragupathy Gandhi

2.N.Sundara Babu

3.N.Ananthagiri

4.N.Muthuraman

: Respondents 1 to 4/ Respondents 1 to 4 /Plaintiffs

5.S.Chandra Prabha

6.K.Premalatha

7.G.Bhanumathi

8.V.Subathra

: Respondents 5 to 8/ Respondents 5 to 8 / Defendants 2 to 5

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the order dated 05.03.2021 passed by the Ist Additional District Judge (PCR), Trichy in I.A.No.1 of 2019 in O.S.No.36 of 2013.

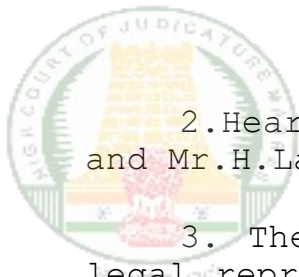
For Petitioners : Mr.T.Lenin Kumar

For R3 & R4 / : Mr.H.Lakshmi Shankar,

Caveators for Mr.K.S.Kathiravan.

O R D E R

The Civil Revision Petition is directed against the order passed in I.A.No.1 of 2019 in O.S.No.36 of 2013, dated 05.03.2021 on the file of the Ist Additional District Court, Tiruchirappalli, dismissing the petition filed under Section 5 of Limitation Act to condone the delay of 1874 days in filing the application for setting aside the preliminary decree passed on 14.08.2014.



2. Heard Mr.T.Lenin Kumar, learned counsel for the petitioners and Mr.H.Lakshmi Shankar, learned counsel for caveators.

3. The revision petitioners are the third parties and are the legal representatives of the first defendant in O.S.No.36 of 2013. The respondents 1 to 4/plaintiffs have filed the suit in O.S.No.36 of 2013, claiming partition. Admittedly, the plaintiffs and originally added first defendant are brothers. The plaintiffs, by alleging that their father had executed a registered settlement deed dated 11.12.2013 in favour of his sons the plaintiffs and the first defendant, have filed the above suit for partition and allotment of their 4/5 shares in the suit property.

4. It is not in dispute that the first defendant has filed a suit in O.S.No.493 of 2010 on the file of the I Additional District Munsit Court, Tiruchirappalli, to declare that he is entitled to purchase the plaintiffs' 4/5 shares in the suit properties and for other reliefs and after contest, the suit was ordered to be dismissed. It is also not in dispute that the sisters of the plaintiffs and the first defendant have filed a petition to implead themselves in the suit and were ordered to be impleaded as defendants 2 to 5.

5. It is evident from the records that the first defendant, after getting sufficient opportunities and after posted as last chance and no further adjournments and thereafter, on the petition filed for extension of time, he has not chosen to file his written statement and hence, he was set ex-parte on 30.7.2013. It is further evident that subsequently, the trial was proceeded and the Ist Additional District Judge has passed the preliminary decree on 14.08.2014, declaring the shares of the plaintiffs, that the plaintiffs have then filed an application for final decree in I.A.No.56 of 2015, that the first defendant entered into appearance through his counsel and subsequently, Advocate Commissioner was appointed and the Commissioner has also filed his report on 26.08.2015, giving two options. The first option is that suit item No.1 can be allotted to the plaintiffs and the second item can be allotted to the first defendant and the plaintiffs can be directed to pay a sum of Rs.3,19,976/- to the first defendant as owelty and the second option is, that recourse under Sections 2 and 3 of Partition Act had to be restored.

6. It is further evident that the trial Court has passed an order that the suit properties are not suitable for division and directed the plaintiffs to take steps for sale of the suit properties either by public auction under Section 2 of the Partition Act or among the sharers, if any such requisition is made under Section 3 of the Partition Act and accordingly, the plaintiffs had filed an application under Sections 2 and 3 of Partition Act, in I.A.No.466 of 2016, that the trial Court has then passed an order on



01.03.2017 appointing an Advocate Commissioner to bring the suit property for auction among co-sharers.

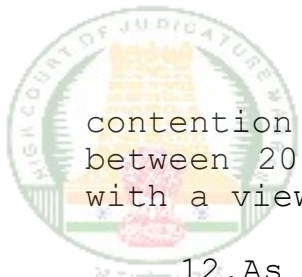
7.It is pertinent to mention that the first defendant has then filed an application for setting aside the ex-parte order in I.A.No.416 of 2016 under Order 9 Rule 7 CPC and that the same was ordered to be dismissed for default on 14.11.2017. After filing of the Commissioner's report on 17.12.2018, the trial Court has fixed the value and directed the Commissioner to auction the property. It is not in dispute that the plaintiffs 1, 3 , 4, first defendant and the wife of the deceased second plaintiff were present and after some offers were made by both sides, the auction was stopped at request of the first defendant and again as per order of this Court, auction was held on 16.11.2019 and that since the plaintiffs have alone made an offer, the same was confirmed. Thereafter, the first defendant has filed the present application in I.A.No.1 of 2019 to condone the delay of 1874 days in filing the petition to set aside the ex-parte preliminary decree dated 14.08.2014.

8.The learned counsel for the caveators would submit that it is not an ex-parte decree as alleged by the revision petitioners and that it is a decree passed after full contest by the plaintiffs and the other defendants and that therefore, the question of setting aside the ex-parte preliminary decree does not arise at all. No doubt, the first defendant was set ex-parte as he has not filed his written statement. Whether the decree passed is divisible and whether the entire decree has to be set aside are the aspects that cannot be gone into, in the present application.

9.As rightly contended by the learned counsel for the caveator, whether the first defendant has shown sufficient cause for the delay occurred in filing the petition for setting aside the ex-parte decree alone is to be considered.

10.The learned counsel for the revision petitioners would submit that the first defendant was a cancer patient and was taking continuous treatment at Adayat Cancer Institute, Chennai for the period between 2014 and 2018, that himself and his family members were not able to concentrate on the case and contact their advocate to give him proper instructions, that the first defendant came to know about the passing of preliminary decree after receiving the notice from the Advocate Commissioner, that his earlier counsel never informed him that he was set ex-parte and passing of preliminary decree and that thereafter, he engaged the present counsel and filed the petition for setting aside the preliminary decree and final decree.

11.It is the specific contention of the plaintiffs that the first defendant was working as an assessor in Electricity Board and he was attending his work continuously and that therefore, his



contention that he was unable to conduct the case for the period between 2014 to 2018 due to cancer treatment is false and is made with a view to get sympathy.

12.As already pointed out, the first defendant had entered into appearance in the final decree petition and subsequently, remained ex-parte and that his application to set aside the ex-parte order was also ended in dismissal for default. It is also not in dispute that the first defendant had taken part in the commission proceedings and also attended the auction conducted by the Advocate Commissioner, as per orders of the Trial Court.

13.Admittedly, the above application came to be filed on 30.09.2019. Even assuming for the arguments sake, that he was taking treatment at Chennai for the earlier period till his appearance in final decree proceedings, he has not shown any reason or ground for not filing the application for setting aside the preliminary decree and the petition to condone the delay in filing the same at that point of time. Admittedly, he has not offered any explanation for the delay for the period between his participation in the final decree proceedings till the filing of the above petition on 30.09.2019.

14.The learned counsel for the caveator would submit that the first defendant, who had been in possession and enjoyment of the suit property right from his birth was stalling division of the property by one way or other and that though the second plaintiff had died two years back the factum of death was not even mentioned by the first defendant in his affidavit filed in support of the above petition.

15.Admittedly, the first defendant has not challenged the final decree. But it is evident from the records that after filing of the revision, the first defendant had died and hence, his wife, son and daughter have filed the present revision. On considering the entire facts and circumstances, as rightly contended by the learned counsel for the caveator, the first defendant had been attempting to drag on the proceedings and thereby prevented his own brothers from getting the property.

16.Considering the above, the finding of the trial court that the above petition came to be filed only to drag on the matter with the *male fide* intention that the respondents could not take their legitimate shares during their lifetime and that the Court could not find any sufficient or reasonable or acceptable reason to condone the delay of 1874 days in filing the petition, cannot be found fault with. Hence, this Court concludes that the revision is devoid of merits and is not inclined to admit the revision.



17. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (T&P)

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/ /2021

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. Ist Additional District Judge (PCR), Trichy.

2. The Section Officer (VR Section) (2C)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.S.KATHIRAVAN, Advocate (SR-23069[F] dated 19/07/2021)

C.R.P (MD) .No.994 of 2021
and
C.M.P (MD) No.5659 of 2021
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SSS (CO)

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