



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.11.2021

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P.(NPD) (MD) No.1733 of 2021

and

C.M.P.(MD) No.9241 of 2021

1.Rajkumar

2.Rekha

3.Renuga

.. Revision Petitioners/ Petitioner/
Petitioner/ 2,3,4 Defendants

-vs-

1.Periyapidari @ Malliga

.. 1st Respondent/ 1st Respondent/
1st Respondent/ Plaintiff

2.Malayakkaal

3.C.Veeranan

.. 2,3, Respondents/ 2,3, Respondents/
2,3, Respondents/ 1,5 Defendants

Prayer :- Petition filed under Section 115 of Civil Procedure Code against the fair and decreetal order of the learned Subordinate Judge, Melur, Madurai District in I.A.No.543 of 2019 in I.A.No.180 of 2017 in O.S.No.846 of 2010 dated 19.01.2021.

For Petitioners : Mr.P.Palani

ORDER

The petitioners herein are defendants 2, 3 and 4 in the suit in O.S.No.846 of 2010, which was filed for partition in which, a preliminary decree has been passed.

2.For the sake of convenience, the parties herein are referred to as per their rank in the suit in O.S.No.846 of 2010.

3.The present revision is filed challenging the order dated 19.01.2021, passed by the learned Subordinate Judge, Melur in



dismissing the application in I.A.No.543 of 2019 in I.A.No.180 of 2017 in O.S.No.846 of 2010 filed by the petitioners herein for condoning the delay of 734 days in filing the application to restore I.A.No.180 of 2017, which was dismissed for default on 27.04.2017. The suit in O.S.No.846 of 2010, filed by the first respondent/plaintiff for a partition, was decreed on 03.06.2015 by the learned Subordinate Judge, Melur granting a preliminary decree declaring the right of the plaintiff to a $\frac{1}{2}$ share in the 'B' schedule property. The preliminary decree was an ex-parte decree, since the defendants had failed to cross examine the plaintiff on 28.04.2015. Defendants 2, 3 and 4 had filed I.A.No.8 of 2017 to set aside the ex-parte decree initially with a delay. The delay was condoned by order dated 19.04.2017 and the application was numbered as I.A.No.180 of 2017. Thereafter, defendants 2, 3 and 4 were directed to take notice in I.A.No.180 of 2017. Since they had failed to take notice, the said application was dismissed by order dated 27.04.2017.

4.The plaintiff had filed I.A.No.36 of 2018 in the above suit for appointing an Advocate Commissioner to inspect and measure the 'B' schedule property in allotting a $\frac{1}{2}$ share to the plaintiff and for passing a final decree. After summons was served on defendants 2, 3 and 4, they had enquired with their counsel, who informed them about the ex-parte order and only then they came to know about the dismissal of I.A.No.180 of 2017. Therefore, they have come forward with the present application in I.A.No.543 of 2019 to condone the delay of 734 days in filing the application to restore I.A.No.180 of 2017. This application has been filed by defendants 2, 3 and 4, who would contend that the 2nd defendant was unable to contact his Advocate, since he was suffering from heart ailment and had been coming in and out of the hospital. The plaintiff had filed a counter *inter alia* denying the averments contained in the affidavit filed in support of the application to condone the delay of 734 days. She would submit that the application is nothing but an attempt on the part of defendants 2, 3 and 4 to protract the proceedings and obstruct the passing of the final decree.

5.The learned Subordinate Judge, Melur on considering the argument on both parties and the medical records provided by the 2nd defendant, came to the conclusion that the defendants have not convinced the Court about their bona fides in filing the said application, that too, with such a huge delay. The learned Subordinate Judge, Melur had opined that the delay had not been properly explained and the document filed in support of their arguments does not advance their case. Challenging the said order, the revision petitioners/defendants 2, 3 and 4 are before this Court.



6.Mr.P.Palani, learned counsel appearing for the revision petitioners would submit that it was only the 2nd defendant, who was conducting the case on behalf of defendants 3 and 4, who are illiterate ladies having no worldly knowledge. He would submit that the 2nd defendant had proved the contentions raised by him in the affidavit filed in support of the application by producing the medical records. He would submit that the Court below has not correctly considered the same and further, the suit is one for a partition and parties should be given adequate opportunity to respond to the case particularly when the decree in question is an ex-parte one.

7.Heard the learned counsel for the petitioner. A perusal of the records would show that at every stage, the petitioners herein have been procrastinating. Although, they had entered appearance in the suit and filed their written statement, they did not go ahead in cross examining the plaintiff and after giving adequate opportunity, the evidence was closed and ultimately, the ex-parte preliminary decree came to be passed on 03.06.2015. The petitioners cannot feign ignorance about the ex-parte preliminary decree, since they had participated in the proceedings and only at the trial stage, they had stayed away from the Court.

8.Be that as it may, the revision petitioners have filed an application to set aside the ex-parte preliminary decree, that too, with delay. The application in I.A.No.8 of 2017 was filed to condone this delay and the same was allowed on 19.04.2017 by directing the petitioners to pay costs of Rs.500/-. Thereafter, the said application for setting aside the ex-parte decree was numbered as I.A.No.180 of 2017 and once again the petitioners had allowed the matter to be dismissed for default by not complying with the orders of the Court to pay batta. Even in this application, the petitioners have not immediately taken steps to restore the same. On the contrary, the instant application is filed for condoning the delay of 734 days in filing the petition to restore I.A.No.180 of 2017, which was dismissed on 27.04.2017. The reason for the delay is the ill-health of the first petitioner. There is no explanation as to why petitioners 2 and 3, who are also the parties to the proceedings, have not taken any steps independent of the first petitioner. The petitioners had earlier filed the application for setting aside the ex-parte decree with delay and the same had been allowed on costs. Despite the same, once again, the petitioners have allowed the petition to set aside the ex-parte decree to be dismissed for default and have now come forward to file the application for restoration with a delay of 734 days. The plaintiff, who had obtained a preliminary decree as early as on 03.06.2015, is yet to enjoy the fruits of the decree. There is no doubt that the Courts have to be liberal in considering an



application for condoning the delay. However, the conduct of the party seeking the condonation has also got to be considered by the Court. In the instant case, it is seen that right from the beginning, the petitioners have not evinced any interest in prosecuting the suit properly and their conduct indicates their intention to protract the proceedings. This Court, cannot come in aid of such litigants.

9. In the above circumstances, I do not find any infirmity in the order passed by the learned Subordinate Judge, Melur dated 19.01.2021 passed in I.A.No.543 of 2019 in I.A.No.180 of 2017 in O.S.No.846 of 2010 and consequently, the Civil Revision Petition stands dismissed. No costs. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

abr

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

The Subordinate Judge, Melur, Madurai District.

+1 CC to M/s.P. PALANI, Advocate (SR-34534[F] dated 15/11/2021)

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RD(03.12.2021) 4P 3C