



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 06.07.2021

Delivered On : 10.08.2021

CORAM:

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (NPD) (MD) .No.1515 of 2015

and

M.P. (MD) .No.2 of 2015

WEB COPY

1.Sivan Pillai
2.K.Nallaperumal Pillai
3.K.Kannan

... Petitioners

Vs.

1.K.Chellammal
2.Uma
3.Sivakumari (Died)
4.Ponnu
5.Uma Shankar
6.Lekshmi
7.Santhakumari
8.Nallaperumal Pillai
9.Usha
10.Thanu Pillai
11.Dr.Ramachandran
12.Padmam
13.Kannappan
14.Nagammal
15.Sankar
16.Surendran
17.Sankari
18.Natesh
19.Shanmugam Pillai
20.Jeyasri
21.Uma Shankar
22.Jeyalakshmi

... Respondents

Respondents 19 to 22 are brought on record
as legal heirs of the deceased 3rd respondent
vide Court order dated 19.01.2021 made in
C.M.P. (MD)No.7285 of 2018 in
C.R.P. (MD)No.1515 of 2015 by TKJ

[R18 represented by mother and guardian 8th respondent R.Sankari]

PRAYER: This Civil Revision Petition has been filed under Section 115 of Civil Procedure Code, to set aside the fair and decreetal order passed in I.A.No.65 of 2012 in A.S.S.R.No.6645 of 2011 on the file of the Principal Sub Court, Nagercoil dated 14.11.2014.

For Petitioners : Mr.M.P.Senthil
For Respondents : Mr.D.Nallathambi
1 to 3, 5, 7 to 10, 12,
13 & 15,19,to 22



For Respondent : Withdrawn
4, 6, 11, 14, 17, 18
For 3rd Respondent : Died

ORDER

This petition has been filed to set aside the order in I.A.No.65 of 2012 in A.S.S.R.No.6645 of 2011 dated 14.11.2014, on the file of the Principal Sub Judge, Nagercoil.

2.The petitioners herein are the petitioners and the respondents herein are the respondents in the condone delay petition. The revision petitioners have filed a petition in I.A.No.65 of 2012 to condone the delay of 1409 days in filing the first appeal in A.S.S.R.No.6645 of 2011.

3.Brief substance of the petition in I.A.No.65 of 2012 is as follows:

The father of the revision petitioners is the third defendant in the suit filed by the respondents. A preliminary decree was passed in the original suit in O.S.No.518 of 1969. At the time of filing the petition for final decree, the petitioners' father died. The petitioners are added as additional defendants. On 22.10.2007, the final decree was passed in the case. The final decree was against the order of this Court in the second appeal. As the legal heirs of third defendant, the petitioners are entitled for the first item of the suit property. The final decree order in I.A.No.10 of 1982 is not proper. The second petitioner was conducting the case on behalf of the petitioners. The second petitioner is a heart patient and he voluntarily retired from service in the year 2007. The second petitioner's wife, Kohila is a chronic patient. She died on 31.04.2011. Since the second petitioner is taking care of his wife, he was not able to file the appeal in time. There was a delay of 1409 days in filing the appeal and prayed the delay to be condoned.

4.Brief substance of the counter in I.A.No.65 of 2012 is as follows:

The case was filed for partition in the year 1966. On 29.04.1972, a preliminary decree was passed. An appeal in A.S.No.47 of 1973 was filed by the father of the petitioners. That appeal was dismissed. The second appeal in S.A.No.2190 of 1994 was filed. The decree of the trial Court was slightly modified. On 10.10.1981, the plaintiffs have filed a petition for final decree. The third defendant alone has filed a counter. The Commissioner by name Kumar, was appointed by the Court. He has filed a Commissioner report regarding the first and second items of the suit properties. On 07.03.1988, no objection was filed against the report of the Commissioner. The final decree petition was adjourned to 06.04.1988. Again the matter was taken up for orders on 11.04.1988. At that time, the third defendant filed a petition in I.A.No.622 of 1988. An order was passed on the petition on 21.12.2001. The third defendant



filed an appeal against the order in A.S.No.57 of 2002 and the petition was remanded back for fresh enquiry.

The third defendant died and the petitioners were impleaded as the legal heirs of the third defendant. Final decree order was passed. E.P.No.51 of 2012 was filed for executing the decree. Notice was served on the petitioners. They filed vakalath through their counsel on 14.09.2012. Subsequently, they filed this petition. The reason for delay is not explained. The second petitioner is a retired Government servant. Another petitioner is working as an Officer in the Police Department. Both of them were taking care of the Court proceedings in this case. Another petitioner is living in Nagercoil, Ilangudi. Only with a motive to prevent the plaintiffs from enjoying the properties, the petitioners have come forward with this petition and the petition is to be dismissed.

5.On the side of the petitioners, one witness was examined and three documents were marked. On the side of the respondents, one witness was examined and three documents were marked. The trial Court dismissed the petition with a cost of Rs.10,000/- (Rupees Ten Thousand only). Against which, the revision petitioners have filed this Civil Revision Petition.

6.On the side of the revision petitioner, it is stated that the appeal was filed only due to the error committed by the trial Court. The judgment rendered is contrary to the directions and the order of remand passed by the appellate Court. In view of the relationship between the parties, the trial Court should have condoned the delay. The trial Court has committed a grave error in imposing a cost of Rs.10,000/- (Rupees Ten Thousand only).

7.On the side of the revision petitioners, it is stated that the third defendant is entitled to suit item 1 and 2 of the property. The other sharers are not entitled to any share in the properties mentioned in schedule 1 and 2. The final decree was passed in I.A.No.10 of 1982 in contradiction to the high Court direction. In appeal in A.S.No.57 of 2002, the District Judge has observed that the trial Court has committed an error in passing the final decree. When no share was allotted to others in item 1 and 2, a final decree cannot be passed on the preliminary decree. The trial Court did not follow the directions of the this Court and mechanically passed the final decree again. The second petitioner was following the case. The second petitioner was attending his sick wife, who passed away and there was a delay of 1409 days. In a partition suit, an opportunity should be given to the other side. Without considering the same, the trial Court has dismissed the petition.

8.On the side of the petitioners, it is stated that the other side can be compensated by cost for the inconvenience caused to the
<https://hcs.courts.mys/govt/hcs/vids/> the Court has to consider the extent of the property



involved and the stake of the parties. In support of this contention, a judgment passed by the Hon'ble Supreme Court in the case of **M.K.Prasad v. P.Arumogam** reported in **2001 (6) SCC 176** is cited, wherein it is stated as follows:

"Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the exparte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience cause to the respondent for the delay on account of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs."

9.On the side of the petitioners, it is stated that the trial Court dismissed the application without sufficient reason and the order is liable to be set aside. In support of his contention, a judgment passed by this Court in the case of **P.Subramanian and others v. S.Viswasam** reported in **2011 (2) CTC 502** is cited, wherein it is stated as follows:

"Trial Court dismissed applications without sufficient reasoning - order liable to be set aside"

10.On the side of the petitioners, it is stated that the Court has to consider whether the delay is inordinate and the inconvenience that may be caused to the other side. In support of his contention, a judgment passed by the Hon'ble Supreme Court in the case of **Esha Bhattacharjee v. Managing Committee of Raghunathpur**, reported in **2013 (5) CTC 547**, is cited.

11.On the side of the petitioners, it is stated that the right of the parties should be decided on merits and an opportunity for the parties has to be given. In support of his contention, a judgment passed by this Court in the case of **Ajay Kumar Gulecha v. J.Vijayakumar and others** reported in **2015 (1) CTC 811** is cited, wherein it is stated as follows:

"No doubt, delay is huge - right over valuable property is involved - suit property measures 2.30 acres with building and is worth several crores - rights of parties should be decided on merits - law of limitation has not been enacted for destroying rights of parties- case has to be decided on merits - interest



of justice requires an opportunity be given to respondent"

12. On the side of the petitioners, it is stated that in a partition suit, the dismissal of the petition will be a prejudice to the litigant and the petition has to be allowed, considering the extraordinary hardship that may be caused to the petitioner. In support of his contention, a judgment passed by this Court in the case of **Rajangam and others v. Senthamaraj and others** reported in **2016 (2) CTC 714**, wherein it is stated as follows:

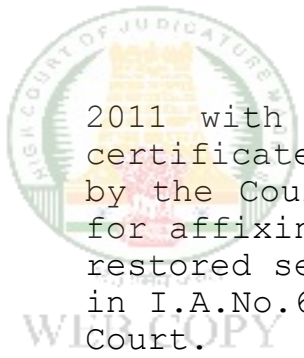
"Held, in partition suit, possibility of negotiation between parties not uncommon- Moreover, status of D8 as wife at stake and decision in suit would be constructive res judicata and D8 would be greatly prejudiced in any other litigation - Considering extraordinary hardship to be caused to D8, application for setting aside exparte decree, held, bound to be allowed - application allowed - costs of Rs.25,000 to be paid by revision petitioner to plaintiffs"

13. On the side of the revision petitioners, it is stated that though the petition will permit the party to participate in the main proceedings, the merits of the matter cannot be thrown out on account of technical issues. In support of his contention, a judgment of this Court in the case of **Sarasu v. Ravi** reported in **2016 (5) CTC 117**, wherein it is stated that:

"Even though the reasons assigned by the petitioner are convincing considering the huge delay and keeping in mind the above said legal position, this Court is of the view that if the delay is compensated by way of costs nothing will be prejudiced to the other side."

14. On the side of the respondents, it is stated that a delay excuse petition should not be allowed in a mechanical manner. The original suit was filed in the year 1969 for partitioning 53/336 share in the suit property. The preliminary decree was passed in 11.10.1970. The appeal in A.S.No.47 of 1973 was filed before the Additional Sub Court, Nagercoil and the same was dismissed. Against which, a second appeal in S.A.No.2190 of 1974 was filed and the second appeal was dismissed confirming the judgment passed by the trial Court on 20.06.1977. Thereafter, a final decree proceedings in I.A.No.10 of 1982 was filed and a final decree was passed on 21.11.2001. The appeal against the final decree was filed in A.S.No.57 of 2002 before the Principal District Court, Nagercoil and the learned Principal District Judge, Nagercoil remanded back the matter on 03.09.2004.

Again the final decree was ordered on 22.10.2007. The revision petitioners tried to file an appeal in A.S.(S.R)No.6645 of



2011 with a delay of 1409 days. The appeal was filed without a certificate copy of the judgment and decree. The appeal was returned by the Court on 10.10.2011 for copy of the judgment and decree and for affixing advocate welfare and clerk welfare stamps. The case was restored several times in a causal manner. The delay excuse petition in I.A.No.65 of 2012 was rightly dismissed by the Principal District Court.

15.The averments in the delay excuse petition is that the petitioners were not residing in the town. But the petitioners were often going to the native place and they are well aware of the proceedings. The second petitioner was said to have taken care of his wife but there was delay even after the death of his wife. No document was filed to show the illness of the wife of the second wife. The nature of the illness, mode of treatment and period of treatment were not stated. In the evidence of P.W.1, it was stated that till 2010, his brother was working in Nagercoil.

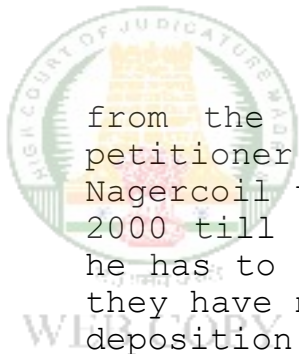
16.It is stated that only after receiving the notice in the execution proceedings, the petitioners have re-presented his appeal memorandum. But the petitioners have not rectified the defeats such as payment of additional Court fee. This will clearly show that there is latch on the part of the petitioners from 30.09.2011 till 10.09.2012. The delay excuse petition in the appeal suit was filed under Section 96 of CPC and under Order 41 Rule 3(A) of CPC not under Section 5 of Limitation Act. The only reason is stated that the third petitioner was entrusted with the duty of conducting the case. The third petitioner is a Police Officer and he used to attend the Court regularly in his official duty.

17.The delay has to be seriously viewed, if the affidavit lacks bonafide. In support of his contention, a judgment of this Court in the case of **Sundar Gnanaolivu v. Rajendran Gnanaolivu** reported in **2003-1-L.W. 585** is cited.

18.On the side of the respondents, it is stated that no presumption can be attached to deliberate delay and the Court should be vigilant not to expose the other side to face litigation. In support of his contention, a judgment in **Esha Bhattacharjee v. Managing Committee of Raghunathpur** case reported in **2013 (5) CTC 547** is cited.

19.On the side of the respondents, it is stated that the Court has to see the conduct behavior and attitude of the parties relating to inaction or negligence. Proper explanation has to be given for each and every day delay. In support of his contention, a judgment passed in **State of Tamil Nadu and others v. Melvisharam and others** reported in **2018 (3) CTC 420** is cited.

20.A perusal of the records reveals that the case was pending



from the year 1969 onwards. P.W.1 has deposed that one of the petitioner is working as a police official and he was working in Nagercoil till 2010. Another petitioner was attending the Court from 2000 till 2010. His evidence clearly reveals that he is aware that he has to take steps to note the Court proceedings now and then and they have not contacted their advocates even through cell phone. His deposition clearly reveals that there is no reasonable cause for the delay and all the brothers are attending the Court. From Ex.P1, it is clear that the wife of the petitioner was 'inpatient' only for 15 days in the year 2011 but the final decree was passed in the year 2007. There is no explanation for the delay from 2007 till 2011. The contention of the respondents is that the appeal was filed without copies of the lower Court judgment and decree and without affixing welfare stamps and the appeal was returned for various reasons. From 30.09.2011 till 10.09.2012, the report reveals that the petitioners are not bonafide and the motive for the petitioners is to drag on the case.

21.The suit is pending from the years 1969 onwards. The plaintiffs are not able to enjoy the fruits of the judgment and decree so far. Only with the motive to delay the proceedings, the petitioners have filed this petition. The delay of 1409 days was not explained by the petitioners and the reasons stated by the petitioners in the petition are not satisfactory. The evidence of P.W.1 clearly reveals that the other petitioners also are attending the Court and conducting the case. The wife of the second petitioner was ill only for 15 days. There is no evidence that she was continuously ill from the year 2007 till 2011.

22.In the above circumstances, the delay seems to be deliberate and with a motive to drag on the case. There is nothing sufficient enough to interfere in the order in I.A.No.65 of 2012 in A.S.S.R.No.6645 of 2011 dated 14.11.2014, on the file of the learned Sub Judge, Nagercoil. Accordingly, this Civil Revision Petition is dismissed. No Costs. Consequently, connected miscellaneous petition is closed. One month time from the date of receipt of copy of this order is granted for payment of cost imposed by the first Appellate Court.

Sd/-

Assistant Registrar (W)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

MRN

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, ensuring that the copy of the order that is presented

<https://hcservices.courts.gov.in/hcservices/>



is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Principal Subordinate Judge,
Nagercoil.

Copy to:-

The Section Officer,
V.R. Section
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-25798[F] dated 10/08/2021)

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-25801[F] dated 10/08/2021)

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-26033[F] dated 12/08/2021)

C.R.P. (NPD) (MD) .No.1515 of 2015

10.08.2021

RD(17.08.2021) 8P 7C