



WEB COPY

C.R.P.(MD)No.1749 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 20.09.2021

Delivered on : 07.12 .2021

CORAM:

THE HONOURABLE **MRS. JUSTICE R. THARANI**

C.R.P. (MD)No.1749 of 2017

and

C.M.P. (MD)No.9448 of 2017

1. R.Vijayalakshmi
2. R.Senthilkumar
3. R.Kamalajothi

... Petitioners / Petitioners/
Defendant 4 to 6

Vs.

Rathna Benefit Funds Ltd.,
Door No.2/205A, G.S.T. Road,
Sattur Town, Sattur Taluk,
Virudhunagar District,
Through its Director
L.Rathinakumar.

... Respondent/Respondent /
Plaintiff

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the Fair and Decretal order dated 04.03.2017 passed in I.A.No.402 of 2016 in O.S.No.73 of 2010 on the file of the Subordinate Judge, Sivakasi, and allow the present Civil Revision Petition.

For Petitioners : Mr.V.Balaji

For Respondent : Mr.Venkatesh

ORDER

This Civil Revision Petition is filed against the order, dated 04.03.2017 passed in I.A.No.402 of 2016 in O.S.No.73 of 2010 on the file of the Subordinate Judge, Sivakasi.

2.The revision petitioners herein are the defendants 4 to 6 in the original suit and the petitioners in the I.A. petition and
<https://hcservices.ecourts.gov.in/hcservices/>



the respondent herein is the plaintiff in the original suit and the respondent in the I.A. Petition.

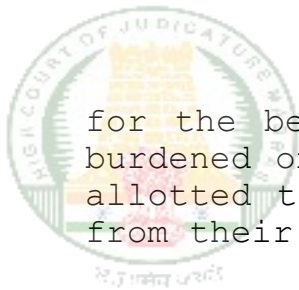
3.The respondent herein has filed a mortgage suit for recovery of money against the husband of the first petitioner. An *ex parte* decree was passed on 13.04.2009 and a final decree petition was filed. The husband of the first petitioner filed a vakalat, subsequently, he died on 30.07.2010 and thereafter, the petitioners were impleaded as the legal representatives of the deceased in the final decree proceedings. On 14.09.2014, the final decree petition was allowed. The petitioners herein filed a petition, in I.A.No.402 of 2016, to condone the delay of 2717 days in filing a petition, to set aside the *ex parte* decree and the delay excuse petition was dismissed by the trial Court. Against the same, the revision petitioners have preferred this Civil Revision Petition.

4. The respondent herein has filed a mortgage suit for recovery of money in O.S.No.134 of 2008, before the Principal District Judge, Srivilliputhur, subsequently, the case was transferred to Sub Court, Sivakasi and was re-numbered as O.S.No.73 of 2010, the revision petitioners are the legal representatives of the deceased first defendant. They filed a I.A.petition for condoning the delay in filing a set aside petition.

5. Brief substance of the petition, in I.A.No.402 of 2016, is as follows:-

5.1.The deceased-Rajasekar / first defendant in the original suit, was the husband of the first petitioner and the father of the second and third petitioners. The respondent filed a suit against the husband of the first petitioner and his brothers. On 13.04.2009, as there was no representation on the side of the defendants, an *ex parte* preliminary decree was passed. The first defendant was ill at that time, and due to heavy loss in his business, he was not able to spend for the medical expenses and he died on 30.07.2010. The petitioners were impleaded as respondents 4 to 6, in the final decree petition, in I.A.No.129 of 2010.

5.2. The petitioners approached the defendants 2 and 3 and then, they came to know that all the three defendants were running a Company viz., M/s. Rajasekar Timber Tippto and that the Company obtained a mortgage loan from the plaintiff. On the information by the defendants 2 and 3, the petitioners filed their counter in I.A.No.129 of 2010 and thereafter, the petitioners came to know that the defendants 2 and 3 misguided them. During the last week of September - 2016, a notice of attachment was pasted on the door steps of the petitioners. Again, the petitioners approached the defendants 2 and 3 and they informed that the suit property was allotted to the share of the first defendant-Rajasekar in the family partition and it was the duty of the petitioners to repay the mortgage loan and to safe guard the house. The loan was obtained



for the benefit of the partnership firm, but, the entire loan was burdened on the first defendant. The mortgaged house was cunningly allotted to the first defendant and the defendants 2 and 3 escaped from their liabilities.

5.3. The defendants 1 to 3 have no right to mortgage the suit property and the suit property was the ancestral property of the defendants. On the date of mortgage, the second petitioner was major and the third petitioner was a minor and the first defendant was entitled only for 1/3rd share in the property.

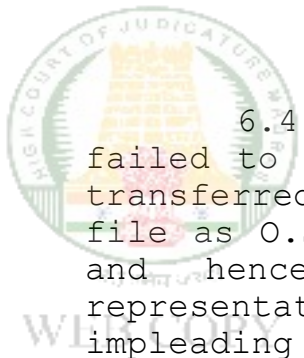
5.4. The suit property was purchased by the great grand father of the petitioners 2 and 3. The mortgage deed was invalid as the petitioners, who are the other share holders, did not execute the mortgage deed. When the petitioners 2 and 3 are having 2/3rd share in the property, the first defendant was having no right to mortgage the property, including the share of the petitioners. The second petitioner met with an accident and was injured and there was financial constraint in the family and since the petitioners have to travel and stay in different places, to run their day to day life and due to the misguidance of the defendants 2 and 3, there was a delay of 2717 days and the same has to be condoned.

6. Brief substance of the counter filed by the third respondent, in I.A.No.402 of 2016, is as follows:-

6.1. The third respondent filed a suit against the father of the second petitioner and the paternal uncles of the second petitioner, before the Principle District Judge, Srivilliputhur, in the year 2007. After complying the defects pointed out by the Court, the suit was re-submitted with a delay of 25 days and hence, a petition, in I.A.No.317 of 2007, was filed for condoning the delay in re-submitting the suit. That petition was dismissed for default.

6.2. To file a set aside petition, there was a delay of 29 days and a delay excuse petition, in I.A.No.449 of 2007, and restoration petition, in I.A.No.450 of 2007, were filed. Notice in both the petitions were received by the second petitioner on behalf of the first defendant and on 26.10.2007, the first defendant filed vakalat in both the petitions. Both the petitions were allowed.

6.3. The suit was taken on file as O.S.No.134 of 2008. Notice was sent to the first defendant through post and he received the same on 23.08.2008. The first defendant made his appearance through his counsel and after getting so many adjournments, the first defendant failed to file a written statement. On 23.12.2008, the first defendant was set *exparte* and on 13.04.2009, a preliminary decree was passed. Subsequently, a petition for final decree, in I.A.No.426 of 2009, was filed and the first defendant made his appearance through his counsel on 25.11.2009.



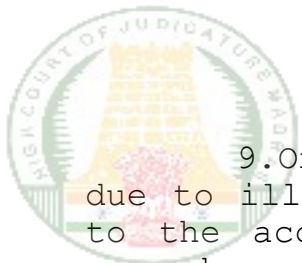
6.4. Even after several adjournments, the first defendant failed to file counter. On pecuniary jurisdiction, the case was transferred to the Sub Court, Sivakasi and the suit was taken on file as O.S.No.73 of 2010. At that time, the first defendant died and hence, the petitioners were impleaded as the legal representatives of the first defendant. There is a delay in impleading the legal representatives and hence, the plaintiff filed a petition in I.A.No.183 of 2011, subsequently, that petition was allowed on payment of Rs.450/- as costs. The abetment was set aside and the petitioners appeared through their counsel, on 08.06.2012, I.A.No.73 of 2012 was allowed on costs. The L.R. Petition in I.A.No.136 of 2012 was allowed on 07.09.2012. Amendment petition in I.A.No.253 of 2012 was allowed. A copy of the amended plaint was served to the respondents 1 to 3 and they have made their appearance, on 01.02.2013 through their counsel.

6.5. Only after a long delay, the petitioners have filed the counter in the final decree petition. Finally, on 04.09.2014, final decree petition was allowed. The plaintiff filed a petition in E.P.No.25 of 2015. Notice in the E.P petition was served on the revision petitioners and they appeared through their counsel. Only after getting several adjournments, the revision petitioners filed a counter and on 19.09.2016, the petition was allowed.

6.6. The petitioners cannot claim that they are not aware of the suit proceedings and they cannot claim that the defendants 2 and 3 mislead them. The second petitioner received the court notice on behalf of his father and he is aware of the Court proceedings, even in the year 2007. All the respondents are educated and they cannot claim that they are innocents. Notice in I.A.No.129 of 2010 was already served. No steps was taken to set aside *ex parte* decree. Only to drag on the case, the petitioners have come forward with this petition. The scan reports taken by the first defendant are of the year 2000, 2001, 2002 and 2007, but, the first defendant is contesting the case from the year 2007. The documents regarding the treatment and the injuries sustained by the second petitioner in an accident are irrelevant to the case. The defendants 1 to 3 obtained a mortgage loan from the plaintiff / respondent in the year 2007. The respondent is fighting for the past 9 years, to get back his amount. The petitioners have taken 5 years to file counter in the E.P petition and prayed the petition to be dismissed.

7. On the side of the petitioners, no witness was examined and two documents were marked. On the side of the respondents, no witness was examined and no document was marked.

8. After hearing both sides, the trial Court has considered that the delay was not properly explained by the petitioners and has dismissed the petition. Against the same, the revision petitioners have approached this Court by way of this Civil Revision Petition.



9. On the side of the revision petitioners, it is stated that due to illness and subsequent death of the first defendant and due to the accident and treatment for the injuries sustained by the second revision petitioner and due to poverty and due to the misguidance of the defendants 2 and 3, the revision petitioners were not able to file a petition in time. The second revision petitioner was major, at that time, without considering the share of the revision petitioners 2 and 3 in the suit property, the defendants 1 to 3 mortgaged the entire property, which is illegal.

10. On the side of the revision petitioners, it is further stated that the property was the ancestral property purchased by the great grand father of the second revision petitioner. The revision petitioners were not parties in the original suit and they have been impleaded only in the final decree proceedings. The first defendant is not entitled to mortgage the entire property. The loan was created for the partnership firm and an opportunity should be given to the revision petitioners to put forth their case and prayed the delay to be condoned.

11. On the side of the respondent, it is stated that the suit is filed for recovery of money. Notice sent to the first defendant was received only by the second petitioner and the second petitioner was having the knowledge of the suit, even when the same was pending before the Principal District Judge, Srivilliputhur, in O.S.No.134 of 2008. A final decree petition was filed in I.A. No.426 of 2009, the first defendant made his appearance and the revision petitioners made their appearance in the final decree petition and in the E.P petition and they cannot claim ignorance of the proceedings. E.P. Petition was filed for recovery of the amount. Attachment was made both in the final decree petition and in the E.P petition. The revision petitioners filed a counter and they have not stated anything regarding their share in the property. The property was auctioned. Only after seven years, the petitioners have come forward with this petition. Each day delay has to be explained. The petitioners have failed to explain the delay of 7 years and four months and hence, the trial Court has rightly dismissed the petition.

12. The learned counsel for the respondent has relied upon a judgment of this Court made in **C.M.P. (MD)No. 10865 of 2017 in S.A. (MD)No. SR3938 of 2017, [S.Alagar and others V. R.Dinakaran and others] dated 01.10.2018**, wherein, it is stated as follows:-

"13. Records perused. The respondents has filed the suit against the petitioners. The petitioners also filed a counter claim and the suit was partly allowed. Against the order, appeal and cross appeal were filed and the first Appellate Court confirmed the Judgment and decree of the trial Court. There was a delay of 957 days in filing the



second appeal and this petition is to condone the delay. A perusal of the records reveals that the respondents herein have filed execution petition in E.P.No.155 of 2015. The petitioners herein appeared before the trial Court in E.P. Proceedings. Even then, the petitioners have not taken sufficient steps to file the appeal in time.

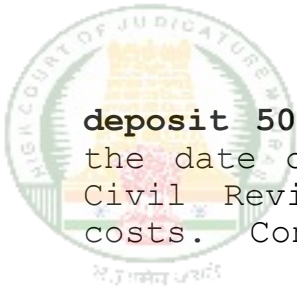
14.....

15.The other point raised by the petitioners is that after getting certified copies again the Advocate Clerk failed to send the same to the petitioners. There is no record to prove this contention. Except the allegation against two of the Advocate Clerks, no other reasons are stated in the petition. It is the duty of the petitioner to follow up the case. From the records, it is clear that the petitioner has appeared before the trial Court in E.P. Proceedings. The petitioners cannot claim that he was not aware of the proceedings. Each day delay is to be explained. In the above circumstances, 957 days is not at all explained by the petitioners. Hence, this delay condone petition is dismissed and Consequently, S.A.(MD) No.SR3938 of 2017 is rejected. No Costs.

13. It is seen that at the time of filing of the suit, there was a delay of 25 days on the part of the respondent herein/ plaintiff. The plaintiff filed a delay excuse petition and the same was dismissed for default. Again, the respondent herein / plaintiff filed a petition to condone the delay of 29 days in restoring the delay excuse petition and that delay was condoned, then only the suit was numbered. But, the delay on the part of the respondent herein/ plaintiff was only 25 days and 29 days. But, here, the delay is 2717 days.

14.The reason stated by the petitioner is that due to illness and due to the subsequent death of the first defendant and due to the accident and treatment for the injuries sustained by the second revision petitioner and due to poverty, the revision petitioners were not able to file a petition in time. It is seen that after the exparte decree, a final decree was passed and E.P petition was also allowed and the property was also auctioned and was purchased by the auction purchaser. It is seen that the revision petitioners were not able to proceed, due to some personal problems or due to the misguidance of the defendants 2 and 3.

15.To facilitate the third revision petitioner, who was a minor at the time of execution of the mortgage deed, an opportunity for the revision petitioners, is to be given in the interest of justice. Hence, this **Civil Revision Petition is allowed** and the order, dated 04.03.2017, passed in I.A.No.402 of 2016 in O.S.No.73 of 2010, on the file of the Subordinate Judge, Sivakasi, is hereby **set aside on condition that the revision petitioners are directed to**



deposit 50% of the E.P amount within a period of four months from the date of receipt of a copy of this order, failing which, this Civil Revision Petition shall stand automatically dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-I)

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/ /2021

Sub Assistant Registrar(CS)

Ls

To

1. The Subordinate Judge,
Sivakasi

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

+1 CC to M/s.A.SIVAJI, Advocate (SR-37529[F] dated 07/12/2021)

C.R.P (MD)No.1749 of 2017

07.12.2021

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