



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.04.2022

PRONOUNCED ON : 13.06.2022

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P(NPD). No.4307 of 2015
and C.M.P. No.1 of 2015

Kannagi ... Petitioner / Defendant

versus

Gubendiran ... Respondent / Plaintiff

PRAYER: Civil Revision Petition has been filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 27.06.2014 made in I.A.No.503 of 2013 in O.S.No.89 of 2011 on the file of the Additional Sub Court, Tiruvannamalai.

For Petitioner : Mr.B.Jawahar

For Respondent : No Appearance

ORDER

Against the dismissal of the petition to condone the delay of 123 days in filing the petition to set aside the *ex parte* decree, this Civil Revision Petition has been filed by the third defendant.



WEB COPY

2. The facts of the case are that the respondent/plaintiff filed the suit for partition against the revision petitioner / 3rd defendant and others.

The suit was posted on 11.02.2013 for filing written statement by the revision petitioner. On the said date, the revision petitioner neither appeared nor filed written statement and therefore, she was set *ex parte* on the same day. Thereafter, the petitioner filed an application to set aside the *ex parte* decree along with a delay of 123 days. The trial Court declined to condone the delay, against which, the third defendant has filed the present Civil Revision Petition.

3. The learned counsel appearing on behalf of the petitioner would submit that the petitioner was suffering from jaundice and stayed at Salem and took native treatment and therefore, she could not able to appear before the Court, which resulted in *ex parte* decree. Subsequently, she filed the present petition with the above delay.

4. The learned counsel for the petitioner would further contend that as far as the *ex parte* order is concerned, there is no time limit



for setting aside the same and therefore, the petitioner is entitled to explain the delay only after passing of the exparte decree and the delay has been properly explained. Since the delay was neither wilful nor wanton, learned counsel prays to condone the same and allow this revision. In support of his contention, learned counsel relied on a decision of the this Court in the case of **VENKATALAKSHMI @ RATHNAMMA vs. BAYAMMA** reported in **2003 (1) CTC 603**.

5. Though the respondent was served notice, he neither appeared in person nor through his counsel. Therefore, this Court has no other option but to proceed with the available materials.

6. Heard the learned counsel appearing for the petitioner and perused the materials available on record.

7. Perusal of the order passed by the trial Court would go to show that despite the grant of adjournments on 18 hearings starting from 11.08.2011 to 11.02.2013 the petitioner / 3rd defendant did not file written



statement and that averment regarding treatment of jaundice for several months i.e. 123 days is utterly false and baseless.

8. There are two issues to be decided in this revision and the same are as follows;

“1. When the other defendants except the 3rd defendant contested the suit, whether the decree passed is a contested decree or uncontested (decree) ?

2. Whether the dismissal of the application filed to condone the delay of 123 days is justified or not ?”

9. The suit is filed for the relief for partition. The plaintiff has claimed 1/6th share in the suit schedule property. According to the plaintiff, the defendants 1 to 4 are each entitled to 1/6th share and defendants 5 and 6 are together entitled to 1/6th share.

10. The written statement filed by the third defendant has been placed on record. Unfortunately, the application to set aside the



ex parte decree did not mention anything about the merits in the claim of the third defendant in the suit. As the application was bereft of details regarding the same, the order passed by the trial court also did not discuss anything about the availability of the merits in the case of the third defendant. The issue to be considered as to whether the delay has to be condoned and an opportunity has to be given to the third defendant to contest the case on merits and would depend upon the nature and merits of the defence taken by the third defendant.

11. Before going into the merits of the matter, the legal issue has to be answered. In the decision rendered by this Court in ***VENKATALAKSHMI @ RATHNAMMA vs. BAYAMMA*** reported in **2003 (1) CTC 603**, it has been held that the decision of the suit on merits against co-defendants does not bar another defendant who has been set *ex parte* in the suit from invoking Order 9, Rule 13 C.P.C. and the petition for setting aside the *ex parte* decree held to be maintainable.



12. The dictum laid down in the above case is applicable to the facts of this case. The decree passed as against other defendants except the third defendant, cannot be a bar for the third defendant to file an application to set aside the *ex parte* decree passed as against the third defendant.

13. The next issue to be decided is whether the order of the trial Court dismissing the application filed to condone the delay of 123 days is justified or not ?

14. The reason stated by the third defendant that she could not take steps to file the written statement on account of jaundice was disbelieved by the trial Court. No doubt the trial Court has given reasonable time for the third defendant to file the written statement. But it appears on account of jaundice she was not able to file the written statement in time. It is relevant to point out that written statement has been filed, along with the application to set aside the *ex parte* decree. Native treatment taken for jaundice cannot be proved by documentary evidence.



WEB COPY



15. Perusal of the written statement filed by the third defendant would go to show that she has substantial claim in the suit property as the contention is that the Settlement Deed was executed in favour of the third defendant by the first defendant. The plaintiff seeks the relief of cancellation of this Settlement Deed. The only interested party to contest this issue would be only the third defendant.

16. Considering the nature of the defence, this Court feels it appropriate that the third defendant / petitioner should be given an opportunity to contest the case on merits. The right of access to justice flowing from Article 21 of the Constitution, would be meaningful only if the party gets the opportunity to contest the case on merits. The inconvenience caused to the parties to the suit must be ordered to be compensated by costs. Therefore, the revision petitioner / third defendant shall pay the costs of Rs.10,000/- [Rupees Ten Thousand only] to the respondent / plaintiff within a period of 10 days from the date of receipt of a copy of this order.



17. In the result, this Civil Revision Petition is allowed and the order dated 27.06.2014 made in I.A.No.503 of 2013 in O.S.No.89 of 2011 on the file of the Additional Sub Court, Tiruvannamalai, is hereby set aside. The trial Court is directed to take the written statement of the third defendant on file and to proceed with the framing of issues and conduct trial and to conclude the same, within a period of 6 months from the date of receipt of a copy of this order. Consequently, connected Miscellaneous Petition is closed.

13.06.2022

Speaking order / Non-speaking order

Index : Yes / No

sri

To

The Additional Sub Court,
Tiruvannamalai.



WEB COPY

C.R.P.(NPD) No.4307 of
and C.M.P. No.1 of



J.NISHA BANU, J.

sri

Pre-Delivery Order made in
C.R.P.(NPD) No.4307 of 2015
and C.M.P. No.1 of 2015

13.06.2022