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C.R.P.No.1054 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2022

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.No.1054 of 2016
and C.M.P.No.5861 of 2016

Dr.Saravanan

.. Petitioner

Vs.

1. Sarala

2. Sarathammal

3. Saritha

.. Respondents

Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 28.10.2015 made in I.A.No.11 of 2015 in unnumbered A.S.No.----/2015 and allow the application in I.A.No.11 of 2015.

For Petitioner : Mr.S.R.Raghunathan

For R1 : Mr.S.Saravanakumar
for Mr.I.Abrar Mohamed Abdullah

For R2 : Mr.M.R.Jothimanian

ORDER

This Civil Revision Petition has been filed as against the fair and final order passed in in I.A.No.11 of 2015 in unnumbered A.S.No.--- of



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2015 dated 28.10.2015, on the file of Principal District Court, Dharmapuri, thereby dismissing the petition to condone the delay in filing the Appeal Suit.

2. The petitioner is the second defendant in the suit filed by the first respondent herein for partition. On receipt of the summons in the suit, the petitioner failed to appear before the Trial Court and as such he was set ex-parte. Ex-parte decree was also passed on 04.07.2012. Only on receipt of final decree notice in I.A.No.374 of 2012, the petitioner had knowledge about the ex-parte decree and filed an application to set aside the ex-parte decree along with a condone delay petition in I.A.No.160 of 2013. The petitioner filed a petition to condone the delay of 230 days and to set aside the ex-parte decree dated 04.07.2012 on the ground that after receipt of notice in the suit, the petitioner had gone out of town and as such the petitioner could not appear before the Trial Court. Therefore, he was set ex-parte and an ex-parte decree was passed on 04.07.2012. Further, his counsel also mixed up his bundle with other bundles and as such he could not file a petition to set aside the ex-parte decree within time.



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3. The Trial Court dismissed the said application for the reason that already the suit was decreed on merits and the reason stated in the condone delay petition is not a believable one. Aggrieved by the same, the petitioner did not prefer any revision so far. After dismissal of the condone delay petition, he preferred Appeal Suit along with an application to condone delay in filing the appeal in I.A.No.11 of 2015. The said application was filed to condone the delay of 914 days delay in filing the Appeal Suit. The said petition was also dismissed by the Appellate Court. Aggrieved by the same, this present revision petition.

4. The learned counsel for the petitioner would submit that the petitioner has statutory right to file an Appeal Suit and the same cannot be denied by way of dismissing the condone delay petition. Though, the petitioner filed a petition to condone the delay in filing a petition to set aside the ex-parte decree, it is not a bar for the petitioner to file an appeal. He can simultaneously exhaust his remedy. Further, it is not the case that the condone delay petition filed to set aside the ex-parte decree was already dismissed and as such the petitioner failed to explain the delay caused in filing the petition to set aside the ex-parte decree and



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there is no point in considering the petition to condone the delay in filing an appeal.

5. In support of his contention, he relied upon the Judgment of the Hon'ble Supreme Court of India reported in **2019 6 SCC 387** in the case of ***Bhivchandra Shankar More Vs. Balu Gangaram More and others***, wherein it was held that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any “sufficient cause” from appearing when the suit was called for hearing. If the Court is satisfied that the defendants was not duly served or that he was prevented for “sufficient cause”, the Court may set aside the ex-parte decree and and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In the regular appeal filed under Section 96(2) CPC, the Appellate Court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant



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pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed. It was further held that the appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed.

6. He also relied upon the Judgment of the Hon'ble Supreme Court of India reported in **2018 2 SCC 649** in the case of ***Neeraja Realtors Private Limited Vs Janglu (Dead) through legal representative***, wherein it was held that a defendant against whom an ex-parte decree is passed has two options: The first is to file an appeal. The second is to file an application under Order IX Rule 13 CPC. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order IX Rule 13.

7. The learned counsel for the first respondent submitted that after dismissing the petition to set aside the ex-parte decree, the first respondent filed an application for final decree in I.A.No.374 of 2012



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and the same was allowed on 16.07.2014 and an Advocate Commissioner was appointed and divided the property in R.E.P.No.104 of 2014 and the respective shares has been allotted and had taken possession of the subject property. Therefore, nothing survives in the Appeal Suit. He further submitted that the ex-parte decree was passed on 04.07.2012. To set aside the ex-parte decree, the petitioner herein filed a petition with condone delay petition to condone the delay of 230 days and the same was dismissed on 02.07.2014. Whereas, the petitioner filed an appeal along with a condone delay petition on 08.01.2015. That apart, the affidavit filed in support of the condone delay petition did not even whisper any proper reasons. Only because he is a dentist by profession and due to medical services, he could not file an appeal in time.

8. Further, a perusal of records revealed that the petitioner filed a petition to set aside the ex-parte decree on 21.03.2013 along with a condone delay of 230 days in I.A.No.160 of 2013, which was dismissed on 02.07.2014. The reasons stated in the affidavit filed in support of the condone delay petition filed with the petition to set aside the ex-parte decree is that after receipt of the notice, the petitioner herein had gone



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out of station and the bundles of the counsel had mixed with some other bundles. Whereas, in the affidavit filed in support of the condone delay petition in filing the Appeal Suit a completely different reasons from the reasons stated in the earlier petition is stated. In the present petition, the petitioner stated that due to medical profession, he could not file an appeal within the time. Therefore, the Appellate Court did not dismiss the petition to condone the delay on the ground that the petitioner already filed a petition under Order IX Rule 13 of CPC and as such it may not be a bar to avail the appeal remedy. It is true that the defendant can exhaust his remedies under Order IX Rule 13 of CPC.

9. In the case on hand, nearly six months after dismissal of the petition to condone the delay in filing the petition under Order IX Rule 13 of CPC, the present petition has been filed by the petitioner to condone the delay in filing the Appeal Suit. There is absolutely no proper reasons stated by the petitioner to condone the delay of 914 days in filing the Appeal Suit. Therefore, the Judgments cited by the petitioner are not applicable to the case on hand. That apart, the first respondent already filed a petition for final decree in I.A.No.374 of 2012 and the same was



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decreed by the final decree dated 16.07.2014. Accordingly, an Advocate Commissioner was appointed and all the subject properties were divided and respective shares were allotted to the respective parties.

10. Therefore, the Court below rightly dismissed the petition filed by the petitioner to condone the delay in filing the Appeal Suit and this Court finds no infirmity or illegality in the order passed by the Court below.

11. Accordingly, this Civil Revision Petition is dismissed. Consequently connected miscellaneous petition is closed. No costs.

05.12.2022

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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G.K.ILANTHIRAIYAN,J.

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To

The Principal District Court, Dharmapuri.

C.R.P.No.1054 of 2016
and C.M.P.No.5861 of 2016

05.12.2022