



C.R.P.No.927 of 2021
and C.M.P.No.7517 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.12.2022

CORAM:

THE HONOURABLE MRS.JUSTICE R. HEMALATHA

C.R.P.No.927 of 2021
and
C.M.P.No.7517 of 2021

Appojiappa

... Petitioner

..Vs..

1. Rathnamma
2. Subramani
3. Anandkumar

... Respondents

PRAYER : Civil Revision Petition filed under Section 115 CPC against the fair and decreetal order dated 05.02.2021 made in I.A. No.1 of 2020 in I.A. No.728 of 2017 in O.S. No.11 of 2017 on the file of the Principal Subordinate Court, Hosur.

For Petitioner : Mr. R. Sagadevan
For Respondents : Mr.R. Jayaprakash

ORDER

The present Civil Revision Petitions is filed against the fair and decreetal orders dated 05.02.2021 made in I.A. No.1 of 2020 in I.A. No.728 of 2017 in O.S. No.11 of 2017 on the file of the Principal Subordinate Court, Hosur.



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2. The revision petitioner is the 1st defendant in O.S.No.11 of 2017 on the file of the Principal Subordinate Court, Hosur. The respondents/plaintiffs filed the suit for partition and for costs. The suit was decreed on 16.03.2017 in favour of the plaintiffs. Thereafter, the plaintiffs filed an application in I.A.No.728 of 2017 for passing of final decree. The revision petitioner/1st defendant entered appearance through a counsel. However, he did not file any counter in the final decree proceedings and therefore he was set *ex parte* on 12.03.2019 and an Advocate Commissioner was appointed to inspect the suit properties and to allot specific shares to the parties concerned. Accordingly, the Advocate Commissioner visited the suit properties and filed her report and plan, based on which the final decree for partition was passed on 19.02.2020.

3. Thereafter, the present revision petitioner filed an application in I.A.No.1/2020 in I.A. No.728/2017 in O.S. No.11/2017 under Section 5 of the Limitation Act to condone the delay of 155 days in filing the application to set aside the *ex parte* final decree passed on 19.02.2020.

The respondents/plaintiffs filed a counter and after considering oral and



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documentary evidence adduced on both sides, the learned Principal Subordinate Judge, Hosur, dismissed the said application on 05.02.2021 by observing thus:

5. It is the specific case of the petitioner that he is 76 years old man and due to his ill health he was unable to instruct his counsel to file counter in I.A. No.728/2017. Now only the petitioner came to know about the ex parte final decree passed in I.A. No.728/2017 on 19.02.2020. Hence, the present petition has been filed to condone the delay in filing petition to set aside the ex parte final decree. On the other hand, the respondents would contend that summons and notice have been served to the petitioners in each and every proceeding. But, even after receipt of the summons and notice the petitioner has not turned up. Hence, he was set ex parte in the suit and final decree proceedings. Hence, the present petition is liable to be dismissed.

6. To substantiate the case of the petitioner, the petitioner has produced Ex.P1 discharge summary and a go through of it reveals that the petitioner was admitted in Sri Chandrasekara Hospital on 16.04.2020 and he was discharged on 18.04.2020. Ex.P2 is the registration slip of Nimhans Hospital dated 26.06.2020 and a perusal of above it could be seen that the petitioner has taken general check



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up in the Nimhans Hospital on 26.06.2020. A careful perusal of the records it could be seen that the final decree petition in I.A. No.728/2017 was filed on 16.08.2017 and notice has been served to the petitioner herein and he has engaged a counsel to appear on behalf of him. However, he has not filed any counter to the petition in spite of sufficient opportunities given to him. Hence, the petitioner was set ex parte on 12.03.2019. Subsequently, advocate Mrs. B.Vahitha was appointed as Advocate Commissioner and she has filed report and plan. After hearing the respondents final decree has been passed on 19.02.2020.

7. The petitioner herein has produced Ex.P1 and Ex.P2 medical certificates and a go through of it discloses that the petitioner has taken treatment for his ailment after 15.04.2020 that too two months after passing the final decree. It is pertinent to note that the petitioner has not produced any documents to show his prolonged illness. Therefore, this Court is of the view that the petitioner has not produced sufficient material to show his illness. Moreover, the age of the petitioner is not a criterion to decide the merits of this petition.

8. The respondents would contend that there are no sufficient causes to allow the present petition and there is an inordinate delay in filing petition to set aside the ex parte



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final decree and it was not explained by the petitioner. Hence, the present petition is liable to be dismissed. As discussed above, the petitioner has not produced documents to show his ailment prior to the final decree that has been passed on 19.02.2020.

*9. Considering the submissions made by both the parties this Court wants to rely upon the judgments reported in **Oriental Aroma Chemical Industries Ltd, v. Gujarat Industrial Development Corporation and Another (2010) 2 Supreme 115:LNIND 2010 SC 205: (2010) 4 MLJ 141** and an excerpt from it would run thus:*

"The law of limitation is found on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribed a period within which legal remedy can be availed for redress of the legal injury. At the same time, the Courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and other similar statutes is elastic enough to enable the Courts to apply the law in a



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meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate"

10. Applying the above said principle to the present case on hand, the delay in the present petition for presentation of petition under Order IX Rule 13 CPC is 155 days. Therefore, there is an inordinate delay in filing application under Order IX Rule 13 CPC. Thus, the applicants must satisfy the court that they have sufficient cause for not making application within the prescribed time."

4. Aggrieved over the same, the present Petition is filed by the revision petitioner/1st defendant.

5. Heard Mr. R. Sagadevan, learned counsel appearing for the revision petitioner and Mr.R. Jayaprakash, learned counsel appearing for the respondents.



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6. Mr. R. Sagadevan, learned counsel appearing for the revision petitioner would contend that the property, which the revision petitioner is already in possession should be allotted to his share and for this limited purpose the present Civil Revision Petition may be allowed.

7. Per contra, Mr.R. Jayaprakash, learned counsel appearing for the respondents drew the attention of this court to the counter filed by the plaintiffs in which it has been specifically contended that at the time when the advocate commissioner visited the property on 22.06.2019 the revision petitioner was also present and signed on the spot notice and that the properties were allotted to the plaintiffs and the defendants in his presence by the learned advocate commissioner. He also contended that the trial court had rightly held that the revision petitioner has not shown sufficient cause for condoning the delay of 155 days in filing the application to set aside the *ex parte* final decree passed on 19.02.2020. He relied on the decision in ***Brahampal Alias Sammay and another vs. National Insurance Company*** reported in **(2021) 6 SCC 512** and contended that the words 'sufficient cause for not making the application within the period of limitation' should be understood and applied in a



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reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case and the type of case. He would also contend that law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise and these principles should be adhered and applied appropriately depending on the facts and circumstances of the case. It is his specific contention that once the valuable right accrued in favour of one party as a result of the failure of the other party, it will be unreasonable to take away that right on the mere asking of the applicant especially when the delay is directly a result of negligence, default or inaction of that party. It is also his contention that final decree, in the instant case, was passed on 19.02.2020 and a specific share was allotted to the plaintiffs and they are in possession of the same and the same cannot be upset at the instance of the revision petitioner.

8. A perusal of the records shows that in the final decree proceedings in I.A. No.728/2017, the present revision petitioner was served with notice and he entered appearance through a counsel also.

However, he did not file any counter and ultimately he was set *ex parte*

and one Mrs. B. Vahitha, advocate, was appointed as an advocate



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commissioner to inspect the suit properties and to divide the same in accordance with the preliminary decree passed by the trial court. Accordingly Mrs. B. Vahitha, the learned advocate commissioner visited the suit properties in the presence of the counsels for the plaintiffs and the defendants including the present revision petitioner and divided the suit properties as per the preliminary decree. It is seen that the 1st defendant did not raise any objection to the advocate commissioner's report. After passing of final decree in I.A.No.728/2017, he filed an application to set aside the *ex parte* decree passed against him along with the petition under Section 5 of Limitation Act to condone the delay of 155 days in filing the application to set aside the *ex parte* final decree passed on 19.02.2020.

9. The specific contention of the learned counsel for the revision petitioner is that the revision petitioner is aged 76 years and was taking treatment in Sri Chandrasekara Hospital, Hosur, between 16.04.2020 and 18.04.2020. In order to substantiate the same, the revision petitioner had filed a discharge summary(Ex.P1) before the trial court apart from marking a registration slip issued by Nimhans Hospital, Bangalore dated 26.06.2020 as Ex.P2. However, the final decree application was filed in the year 2017 and the revision petitioner was



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served with notice in the said application. As already observed, he had engaged a counsel to appear on his behalf. Ex.P1 and Ex.P2 medical reports do not support the case of the revision petitioner and as rightly observed out by the trial court, the revision petitioner has not adduced sufficient materials to show that he was unable to meet his counsel on account of his illness. Merely because the revision petitioner is aged 76 years, he cannot be shown any lenience especially when he was very much present at the time when the advocate commissioner visited the suit properties. He had also signed on the spot notice as is seen from the records. Moreover, the final decree was passed on 19.02.2020 allotting a specific share to the plaintiffs. The Revision petitioner has not mentioned the survey number of the property in which he is in possession and the petition is also bereft of these particulars. Even now the counsel for the revision petitioner is not able to state the survey number of the property which the revision petitioner wants to be allotted to his share and in the facts and circumstances, I do not find any infirmity in the orders passed by the trial court and accordingly, the Civil Revision Petition is liable to be dismissed.



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10. In the result,

- i. the Civil Revision Petition is dismissed. No costs. Consequently connected miscellaneous petition is also dismissed.
- ii. the fair and decreetal orders dated 05.02.2021 made in I.A. No.1 of 2020 in I.A. No.728 of 2017 in O.S. No.11 of 2017 on the file of the Principal Subordinate Court, Hosur, is upheld.

02.12.2022

Index : Yes/No
Internet : Yes/No
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To

1. The Principal Subordinate Judge, Hosur,
2. The Section Officer, V.R. Section, High Court, Madras.



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