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C.R.P. (NPD) .No.2177 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P.(NPD).No.2177 of 2020

and

C.M.P.No.13707 of 2020

1.A.S.Khader Basha

2.M.B.Habeebur Rahman

.. Petitioners

Vs.

G.Palani

.. Respondent

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, praying to set aside the order dated 30.01.2020 in I.A.No.13539 of 2018 in O.S.No.6880 of 2013 on the file of XVII Assistant City Civil Court at Chennai by allowing the Civil Revision Petition.

For Petitioners : Mr.A.Balasingh Ramanujam

For Respondent : Mr.K.Murali

ORDER

The Revision is against the order of the trial Court dismissing the application for condonation of delay of 170 days in filing an application seeking to set aside the *exparte* decree.

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2. The respondent filed a suit in O.S.No.6880 of 2013 seeking a declaration that he is entitled to unobstructed passage over the schedule 'B' property leading to schedule 'A' property and for mandatory injunction to demolish and remove any construction that has been put up by the defendants over the said passage.

3. Notice was attempted to be served in the said suit on the defendants only once. The said notice was returned unserved with the endorsement 'left- not residing in the said address'. Even without attempting service of summons to the correct address, paper publication was ordered and the publication was effected. The defendants were called absent and set *exparte* and the suit came to be decreed *exparte* on 30.04.2014. Upon service of notice in the execution petition, the defendants came up with the instant application claiming that they were not served with summons and service was attempted on the defendants, in the suit property, at the time when the building therein was demolished and the defendants had moved out for the purpose of demolition and re-construction of the building.



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4. They would also claim that, upon service of notice, they had instructed their counsel to enter appearance in the execution proceedings and also file a petition to set aside the *exparte* decree. However, the counsel who filed vakalath in the execution proceedings did not file counter and an *exparte* order came to be passed in the execution petition. It is thereafter the petitioners/ defendants in the suit have come up with the application seeking condonation of delay of 170 days on 1st October 2018. This application was resisted contending that the defendants have not made out sufficient cause for setting aside the *exparte* decree.

5. The learned trial Judge, upon a consideration of the materials, concluded that the ignorance of law is not an excuse for delay and that the petitioners have not explained the delay to the satisfaction of the Court. On the said conclusion, the learned trial Judge dismissed the application.

6. Mr.A.Balasingh Ramanujam, learned counsel appearing for the petitioners would vehemently contend that once it is found that the service in the suit was not proper, the Court must have taken a liberal view on the question of delay.



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7. Contending contra, Mr.K.Murali, learned counsel appearing for the respondent/ plaintiff would submit that the decree was passed as early as in the year 2014 and it is almost 7 years now, he is unable to enjoy the fruits of the decree. According to him, the petitioners by putting up construction on the pathway had blocked the only way to his house.

8. I do not propose to dwell into the merits of the claim now. It is only at the stage of condonation of delay. Admittedly, notice sent to the petitioners was returned with endorsement that they were not residing in the said address. The Court, without even attempting service to the correct address, straight away ordered publication and an *exparte* decree came to be passed. The manner in which the *exparte* decree came to be passed itself is irregular in my considered opinion. An attempt to serve the defendants through Court or at least by post should have been made before resorting to publication. Upon service of notice in the execution petition, within a reasonable time, the petitioners have approached the Court for setting aside the *exparte* decree by way of an application for condonation of delay.

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9. No doubt, the trial Court was right in concluding that ignorance of law cannot be a ground, but, at the same time the Court must also see reasonableness of the claim made. Admittedly, notice in the execution petition was served on the petitioners on 15.03.2018 and the application was filed on 01.10.2018. This delay is sought to be explained by stating that though the petitioners instructed their counsel to file an application to set aside the *exparte* decree, their counsel failed to do so. He also failed to file counter in the execution petition, resulting in *exparte* order being passed against them in the execution petition also.

10. Considering the nature of the suit and the nature of the decree that has been granted, which may lead to demolition of portion of the building that has been put up by the petitioners, I am of the opinion that they must be given a chance to contest the suit on merits. In view of the above, I am convinced that the petitioners should be afforded an opportunity, but, at the same time the respondents should be compensated for the delay.



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11. Hence, this Civil Revision Petition is **allowed** on condition that the petitioners pay a costs of Rs.10,000/- to the counsel for the respondent appearing in this Court on or before 31.01.2022, failing which the revision will stand dismissed. Upon production of receipt for payment of costs of Rs.10,000/-, the trial Court is directed to number the application under Order IX Rule 13 of the Code of Civil Procedure and proceed to dispose of the same in accordance with law. No costs. Consequently, the connected miscellaneous petition is closed.

12.01.2022

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To

The XVII Assistant City Civil Court, Chennai.

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R.SUBRAMANIAN, J.

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