



C.R.P.No.3453 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:02.12.2022

CORAM:

THE HONOURABLE Mr. JUSTICE S.SOUNTHAR

C.R.P.No.3453 of 2022
in CMP.No.18402 of 2022

1.Anthoni Ammal
2.Arokiasamy @ Arokiya Doss @ Palayam

...Petitioners

Versus

1.Kitheri Ammal
2.Vijayakulamerry @ Egalamerry
3.The President,
Tamil Nadu Slum Clearance Board,
Kamalarajar Salai,
Chennai – 600 005.

...Respondents

PRAYER: Civil Revision Petition filed under Section 115 of CPC, praying to set aside the order of the learned Principal Judge, City Civil Court, Chennai, dated 30.06.2022, passed in I.A.No.2 of 2022 in A.S.SR.No.1166 of 2022.

For Petitioners :Mr.C.Umashankar



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O R D E R

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The Civil Revision Petition is filed challenging the order passed by the Court below, dismissing the petition to condone the delay of 3413 days, in filing first appeal against the *ex parte* decree for partition dated 10.08.2012.

2. The petitioners herein are the defendants 1 and 2 in a suit for partition in O.S.No.379 of 2010 on the file of the learned Principal Judge, City Civil Court, Chennai, filed by the respondents 1 and 2.

3. In the affidavit filed in support of the petition to condone the delay of 3413 days, the petitioners have stated that they had no legal knowledge and procedure. It was admitted by them that summon in the suit was served on them and they filed a written statement on 28.09.2010. It was alleged that after filing of written statement, they had been meeting their Advocate and he used inform them that the case was pending and they need not worry about the same. It was also alleged that the petitioners through another Advocate acquired knowledge in the year 2017 that they had already



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filed a petition to set aside the *ex parte* order passed against them on 18.08.2010 in I.A.No.18342 of 2010. It was alleged that though the said I.A was allowed on condition that the petitioners should deposit a sum of Rs.400/- as costs, the same was not informed to them by their Advocate and consequently, the said I.A was dismissed and subsequently, *ex parte* preliminary decree of partition was passed on 10.08.2012. The failure of the petitioners to pay costs of Rs.400/- as ordered in I.A.No.18342 of 2010 to set aside the *ex parte* order is neither willful nor wanton.

4. The petitioners further alleged that after acquiring knowledge about all these happenings in the year 2017, they had filed a petition to set aside the *ex parte* decree and there was a delay of 1905 days in filing a petition to set aside the *ex parte* decree. The petitioners filed I.A.No.16250 of 2017 to condone the delay of 1905 days in filing the petition to set aside *ex parte* decree and the same was dismissed by the trial Court. Aggrieved by the same, the petitioners filed a revision before this Court in CRP.No.1392 of 2019 and the same was dismissed. Subsequently, the petitioners filed a SLP No.16187 of 2021 and the same was also dismissed on



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20.10.2021. Thereafter, the petitioners were advised to file an appeal against the *ex parte* decree in the year 2010 and hence, they filed a regular first appeal in AS.SR.No.1166 of 2022 before the First Appellate Court. Since there was a delay of 3413 days in filing the said appeal, an application was filed to condone the delay.

5. It was further averred that since the petitioners were prosecuting the remedy under Order 9 Rule 13, they had not filed the regular first appeal in time.

6. Not satisfied with the reasons assigned by the petitioners to condone the inordinate delay, the Court below has dismissed the condone the delay petition and aggrieved by the same, the petitioners are before this Court.

7. The learned counsel for the petitioners vehemently contended that the petitioners are illiterate persons and they do not know the Court procedure. Further, it was stated that the Advocate who had been engaged by



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the petitioners, failed to inform the passing of *ex parte* order against the petitioners and hence, there was a huge delay of 3413 days in filing the appeal. It was further alleged by the learned counsel for the petitioners that as against the *ex parte* decree, the petitioners have an option to either file a petition under Order 9 Rule 13 of CPC or to file an appeal challenging the *ex parte* decree.

8. The learned counsel for the petitioners further submitted that already the petitioners filed a petition to set aside the *ex parte* decree and the same was dismissed by the trial Court and said order was confirmed by this Court.

9. It is also stated that the SLP filed by the petitioner challenging the order of this Court order was also dismissed. Thereafter, the petitioners have been advised to file regular appeal and hence, there is a delay of 3413 days.

10. The petitioners have given two reasons for condoning the



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huge delay of 3413 days. Firstly the petitioners have blamed the Advocate and stated that passing of *ex parte* decree was not at all informed to them.

Secondly, the petitioners contended that after acquiring knowledge about the *ex parte* decree in the year 2017, after receiving notice in the final decree proceedings, the petitioners had been prosecuting the remedy available under Order 9 Rule 13 of CPC by filing a petition to set aside the *ex parte* decree and therefore, they have not filed a regular appeal immediately, after acquiring knowledge about the passing of *ex parte* decree against them.

11. As far as the first reason assigned by the petitioners is concerned, the said reason was mentioned by them for explaining the huge delay in filing a petition to set aside the *ex parte* decree and the said reason was not accepted by the Court below and the order passed by the Court below refusing to accept the said reason was confirmed by this Court in CRP.No.1392 of 2019. It is also pertinent to mention that the said order passed by this Court was also confirmed by the Apex Court in SLP.No.16187 of 2021. Therefore, the petitioners are not entitled to press into service the very same reason namely, their Advocate failed to inform the passing of *ex*



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parte against them again while explaining the delay in filing regular appeal challenging the *ex parte* decree.

12. As far as the second contention of the revision petitioners that they have been prosecuting the remedy available under Order 9 Rule 13 of CPC all along and hence, there is a delay of 3413 days in filing an appeal also cannot be accepted.

13. It is settled law that as against the *ex parte* decree, the aggrieved party is entitled to the following remedies:

(i) Filing of petition under Order 9 Rule 13 of CPC, seeking to set aside the *ex parte*;

(ii) Filing of appeal under Section 96 of CPC, challenging the decree;

(iii) Filing of Review Application under Section 114 of CPC.

14. It is also settled that all these remedies can be prosecuted by



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the petitioners simultaneously but not as one after another. In the case on hand, the petitioners herein want to challenge the *ex parte* decree dated 10.08.2012 in the year 2022 by filing a regular appeal. It was the case of the petitioners that they have acquired knowledge about the *ex parte* decree only in the year 2017, after receipt of notice in final decree proceeding. However, they have been prosecuting the first remedy under Order 9 Rule 13 of CPC from 2017 to 2021 by filing a revision before this Court and SLP before the Apex Court. When the petitioners met with failure in prosecuting the first remedy they had decided to explore the possibility under the second remedy namely filing of appeal, challenging the *ex parte* decree. It is not open to the petitioners to explore the remedies one after another. Therefore, the reason given by the petitioners for explaining the delay from 2017 to 2022 cannot be treated as a sufficient cause within the meaning of Section 5 of Limitation Act. Even, otherwise, the petitioners have not produced any supporting evidence in support of their explanation for delay from 2012 to 2017. Mere averments made in the affidavit as if their previous counsel failed to inform the passing of *ex parte* dated 10.08.2012 cannot be accepted that too without any supporting evidence. The litigant prosecuting the original suit is expected



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to have interaction with the Advocate frequently and hence, the explanation offered by the petitioners from 2012 to 2018 cannot be accepted.

15. In view of the same, there is no error in the order passed by the Court below warranting interference by this Court. Consequently, the Civil Revision petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

02.12.2022

Index: Yes/ No
Speaking Order / Non-Speaking Order
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To
The Principal Judge,
City Civil Court,
Chennai.

S.SOUNTHAR, J.

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