



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.01.2022

CORAM

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P(MD)No.2125 of 2012

and

M.P(MD) No.1 of 2012

- 1.A.Esakki Konar (died)
- 2.E.Sivan
- 3.E.Sankaran
- 4.Lakshmi
- 5.Rajkumari
- 6.E.Krishnan
- 7.E.Annamalai
- 8.E.Madasamy
- 9.E.Marimuthu
- 10.Parvathi

... Petitioners/Petitioners/
12th Defendant

(Petitioners 2 to 10 are brought on record as Lrs of the deceased sole petitioner vide Court order dated 21.09.2021 made in CMP(MD) No.7744 of 2021)

Vs.

A.Chokayee

... Respondent/Respondent/
Plaintiff

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair order passed in I.A.No.490 of 2011 in O.S.No.85 of 2004 dated 09.02.2012 on the file of the Principal District Munsif Court, Nanguneri, by allowing this civil revision petition.

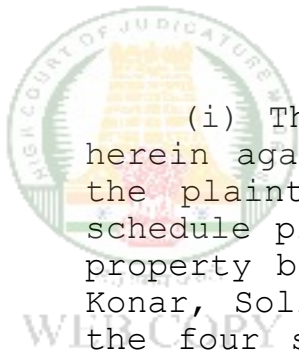
For Petitioners : Mr.H.Arumugam

For Respondent : No appearance

ORDER

The above petition is filed by the 12th defendant challenging the dismissal of his application for condoning the delay of 2526 days in filing the application to set aside the *ex parte* decree dated 28.09.2004 made in O.S.No.85 of 2004.

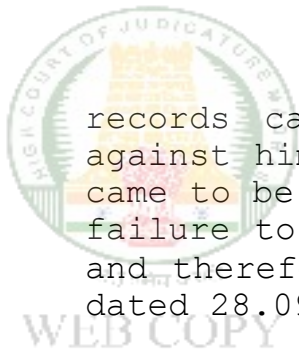
2.The brief facts are as follows:-



(i) The suit in O.S.No.85 of 2004 was filed by the respondent herein against the revision petitioner and others for partition of the plaintiff and the third defendant's 1/3rd share in the suit schedule properties. The plaintiff's case is that the suit schedule property belongs to one Annamalai Konar who had four sons Subbiah Konar, Sollamuthu Konar, Velu konar and Esakkikonar. On his death, the four sons had inherited the properties and were enjoying the possession of the same. One of the sons Velu konar had released his share in the property in favour of his brothers. Therefore, Subbiah Konar, Sollamuthu Konar and Esakki konar each became entitled to 1/3 share. The plaintiff and the third defendant are the daughters of the Subbiah Konar. The first defendant is the son of Sollamuthu Konar and the second defendant is the son of Esakki konar. Subbiah Konar died in the year 1984 and his widow Pappathi died in the year 1994. Therefore, the plaintiff and the third defendant became entitled to their father's 1/3rd share in the suit schedule property. The plaintiff would submit that she is in joint possession of the property along with the defendants 1 and 2 and has been paying kist in respect of the lands. She is also residing in the house put up by her in item Nos.1 and 2 of the suit schedule properties. After the demise of the plaintiff's husband in the year 1994, the defendants 1 and 2 had started disturbing her possession of the suit property by setting up a illegitimate claim to the properties. After the plaintiff had demanded partition of the properties on 07.10.1994, they have started disturbing her possession and enjoyment of the property. Therefore, the plaintiff had come forward with the suit. Pending the suit, the defendants 4 to 11 were impleaded as party defendants.

(ii) The written statement had been filed on behalf of the defendants 1 and 2 contending that the plaintiff was not entitled to 1/3rd share and that Annamalaikonar had five sons and not four sons as contended. Muthumalaikonar was one of the sons of velu konar. They would further submit that the plaintiff's father Subbiah konar had sold his share to Velukonar. His brother Muthumalaikonar had also sold the property to Velukonar and Velukonar in turn sold the property to defendants 1 and 2. Therefore, the entire suit schedule property belonged to them. The 12th defendant, who was impleaded, by orders, dated 04.02.2003, is the son of Annamalaikonar. The 12th defendant / revision petitioner had taken out the impugned application.

(iii) It is his case in the affidavit filed in support of the petition that he had received summon in the suit and since he was unwell, he had not appeared before the Court. Thereafter, considering his age and his forgetfulness, he had not taken steps to appear in the suit. Thereafter, on 23.09.2011 when the plaintiff had come for a function, he had informed him about the suit and the same being decreed in his favour and that steps were taken to partition the properties by appointing a commissioner. Immediately, the respondent had called his advocate and after perusing the Court



records came to learn that an *ex parte* order had been passed against him on 13.11.2001 and thereafter on 28.09.2004 the judgment came to be pronounced against himself and the other defendants. The failure to appear before the Court on 13.11.2001 was not deliberate and therefore, he had sought to have set aside the *ex parte* decree dated 28.09.2004.

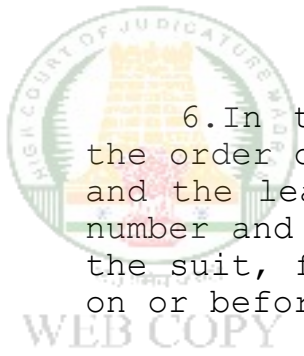
(iv) The plaintiff had filed a counter *inter alia* contending that the affidavit filed in support of the petition is bereft of any reasons and the revision petitioner does not explain as to why from the year 2001 when he had been set *ex parte*, he had not taken any steps though he has admitted that he had received the summons in the above suit. The plaintiff would further submit that the decree is not an *ex parte* decree, but is the contested one and considering the fact that no reasons have been given for condoning the delay, the petition deserves to be dismissed.

(v) The learned Principal District Munsif, Nanguneri, by his order, dated 09.02.2012, had dismissed the said application. Challenging the same, the revision petitioner is before this Court.

3.The learned counsel appearing on behalf of the revision petitioners would contend that the plaintiff has come to the Court with an absolutely false case. Annamalaikonar the original owner of the property had nine children namely Avudaiammal, Subbiah, (plaintiff and third defendant's father), Suddalaimuthu, Velu, Ananjiammal, Muthumalai, Parvathi, Esakki and Gomathi. The plaintiff has impleaded none of the above parties except for impleading the second defendant, the son of the Esakki, the legal representative of the Muthumalai.

4.The respondent/plaintiff though served, has not entered appearance. Heard the learned counsel for the petitioner and perused the records.

5. A reading of the *ex parte* judgment would show that the same is not the contested one, but an *ex parte* judgment. The judgment is also flawed, considering the fact that even according to the amended plaint, the legal heir of Muthumalai had also been impleaded and even assuming that the claim as portrayed in the amended plaint is correct, then the plaintiff and the third defendant would only be entitled to $\frac{1}{4}$ th share as rightly pointed out by the learned counsel for the petitioner. The plaintiff has deliberately suppressed the fact that there are five other claimants to the suit property, who have not been impleaded. It is also informed that the final decree proceedings have not been initiated. Therefore, in the light of the above, not only should the delay be condoned, but the *ex parte* decree should also be set aside.



6.In the result, this civil revision petition is allowed and the order dated 09.02.2012 passed in IA No. 490 of 2011 is set aside and the learned Principal District Munsif, Nanguneri is directed to number and allow the petition for restoration and thereafter take up the suit, frame additional issues and proceed to dispose of the suit on or before 31.08.2022.

Sd/-

Assistant Registrar (Crl side)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

cp

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:-

The Principal District Munsif,
Nanguneri.

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-1088[F] dated 10/01/2022)

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and
M.P (MD) No.1 of 2012
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RK(09/02/2022) 4P 3C