



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **17.08.2022**

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.A(MD)No.788 of 2022
and
C.M.P(MD)No.7170 of 2022

George :Appellant/Petitioner/
Third Respondent/Third Defendant

.VS.

1.Selvi :First Respondent/First Respondent/
Petitioner/Plaintiff

2.Lalitha(died)

3.Sarbie Soorial

4.Sharlet

5.Belsy Soorial :Respondents 3 to 5/Respondents
3 to 5/Respondents 2,4 and 5/
Defendants 2,4 and 5

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 of Civil Procedure Code against the fair order and decretal order made in E.A.No.4 of 2022 in E.P.No.18 of 2020 in O.S.No.429 of 2010, dated 23.3.2022, on the file of the Principal District Munsif, Kuzhithurai.

For Appellant

:Mr.M.R.Sreenivasan



JUDGMENT

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This Civil Miscellaneous Appeal is directed against the fair and decretal order made in E.A.No.4 of 2022 in E.P.No.18 of 2020 in O.S.No.429 of 2010, dated 23.3.2022, on the file of the Principal District Munsif, Kuzhithurai.

2.The appellant is the third defendant in the suit in O.S.No. 429 of 2010, on the file of the Principal District Munsif, Kuzhithurai.The first respondent herein filed the suit in O.S.No.429 of 2010 for declaration. The suit was decreed. Challenging the same, the appellant filed an appeal and he lost in the appeal. Subsequently, the respondent/decreed-holder filed execution Petition in E.P.No.18 of 2020, on the file of Principal District Munsif, Kuzhithurai. In the E.P, notice was served to the appellant and subsequently he did not participate in the execution proceedings and hence an exparte order was passed against the appellant. Therefore, the appellant filed E.A.No.4 of 2022 before the Execution Court to set aside the exparte order, for which, there was a delay of 326 days and that petition was dismissed by the Execution Court. Now challenging the said order, the appellant has filed the present Civil Miscellaneous Appeal before this Court.



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3.The learned counsel for the appellant would submit that the respondent got a decree in O.S.No.429 of 2010 for an extent of 17 cents within specific boundaries mentioned in the decree, though he filed E.P before the Execution Court, however he is in apprehension that his residential house would be disturbed, which is adjacent to the petition mentioned property. He has further apprehended that his house will be disturbed at the time when taking delivery of the property and hence, his presence is necessary at the time of taking delivery of the property. If the delay is not condoned and exparte order in the E.P is not set aside, he will be put to great prejudice and hardship.

4.Heard the learned counsel appearing for the appellant and perused the materials placed before this Court.

5.Admittedly, the first respondent herein filed the suit in O.s.No.429 of 2010 for declaration and got decree in his favour. Though the appellant herein challenged the decree passed by the trial Court upto this Court, he lost in the same and the E.P filed by the respondent is pending. Though this appellant is arrayed as third defendant in the suit and third respondent in the E.P, initially he



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appeared through counsel and subsequently he did not appear. Therefore, there is an ex parte order as against the appellant passed by the Executing Court and he filed a petition to set aside the ex parte order with a delay of 326 days and that petition was dismissed. It is settled proposition of law that condoning the delay is the discretionary power of the Court and while deciding the petition to condone the delay, the Court has to exercise its discretionary power judicially and normally, this Court will not interfere with the same, unless this Court finds any arbitrariness or mala fide in the order of the Court below.

6. A reading of the entire order passed by the Court below in E.A.No.4 of 2022 does not find any reason to interfere with the same. However, since the appellant herein lost his battle upto this Court and that E.P has been filed to take delivery of 17 cents, for which, a decree was obtained by the decree-holder, the apprehension expressed by the appellant is without any substance. The attitude of the appellant clearly shows that it is only to delay the execution proceedings and that the appellant has purposefully evaded from the E.P proceedings, for which, he has filed a petition to set aside the ex parte order, that too, with a delay of nearly one



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year. The reasons stated in the affidavit filed in support of the condone delay petition is not satisfactory. Therefore this Court does not find any perversity in the order of the Court below and the appeal is liable to be dismissed.

7. Since the appellant is the adjacent owner of the decretal portion and at the time of taking delivery, the Amin of the Court below should ensure the presence of the appellant herein and the delivery has been effected in the presence of the appellant. The appellant is directed to participate at the time when the Amin of the Court below is taking delivery of the said property. The Court below is directed to ensure the presence of the appellant herein and give him an opportunity to be present at the time of taking delivery in the execution proceedings. The Court below should ensure while recording delivery that the Court Official has given an opportunity to the appellant for being present at the time of taking delivery of the said property.

8. With these directions, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is dismissed.

17.08.2022



Index:Yes/No

Internet:Yes/No

vsn

To

- 1.The Principal District Munsif,
Kuzhithurai.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN.,J.

vsn

JUDGMENT MADE IN
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and
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