



C.M.A(MD)No.253 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 18.11.2022

Pronounced on : .2022

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

C.M.A(MD)No.253 of 2018

1.Pushpavalli

2.Jayanthi

3.Shanthi

4.Anandhi

5.Karikalan

6.Suganthi

7.Sumathi

...Appellants/ Petitioners

Vs

Santhanam

... Respondent / Respondent

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section XLIII Rule 1(t) of C.P.C., to allow the Appeal by setting aside the order of dismissal dated 24.10.2017 made in I.A.No.343 of 2017 in C.M.A.No.3 of 2017 on the file of the Principal District Court, Tiruchirappalli.



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For Appellant : Mr.Shangar Murali

For Respondents : Mr.S.Saravanamuthu

JUDGMENT

This Civil Miscellaneous Appeal is filed against the order in I.A.No. 343 of 2017 of the learned Principal District Judge, Trichirappalli. The appellants herein are the petitioners and the respondent herein is the respondent in the I.A. petition.

2.The respondent herein is the plaintiff in the original suit. He filed a suit for partition and for injunction, preventing the defendants from constructing any superstructure in the suit first schedule property and to restrain the defendants to make any alienation in the property. He filed a petition in I.A.No.863 of 2016 to restrain the respondents from constructing any superstructure in the first schedule property and to restrain the respondents from making any alienation on encumbrance in the property till the disposal of the suit. That petition was allowed by the learned II Additional Subordinate Judge, Trichy. Against that order, the defendants 1 to 7 in the original suit preferred an appeal in C.M.A.No.3 of 2017 on the file of the Principal District Judge, Trichy. The case was adjourned to 08.08.2017



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for arguments. Since the appellants were not able to be present before the Court or to instruct the counsel, that appeal was dismissed for default. Hence, the appellant filed a petition in I.A.No.343 of 2017 to set aside the order C.M.A.No.3 of 2017. That petition was dismissed by the learned Principal District Judge, Trichy. Against the order, the appellant has filed this appeal.

3.Brief substance of the I.A.No.343 of 2017 is as follows:

The petitioners are the respondents in the original suit. The petitioners filed C.M.A.No.3 of 2017 on the file of the District Judge, Trichy, to set aside the order of the learned II Additional Sub Judge, Trichy, made in I.A.No.863 of 2016 in O.S.No.1006 of 2016. That C.M.A.No.3 of 2017 was posted on 08.08.2017. Since the first petitioner / first defendant was suffering from dysentery and since the other defendants were out of station, they were not able to be present before the Court or to give suitable instructions to the counsel and that C.M.A.No.3 of 2017 was dismissed on 08.08.2017. Unless the order of dismissal is set aside, the petitioner will be to put into irreparable loss and hardship.

4.Brief substance of the counter filed by the respondent in I.A.No.343 of 2017, is as follows:



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In O.S.No.1006 of 2016 pending on the file of the II Additional Subordinate Court, Trichy, a petition in I.A.No.863 of 2016 was filed and the same was allowed on 10.11.2016. The petitioner herein filed a Civil Miscellaneous Appeal against the order in I.A.No.863 of 2016 only with a motive to drag on the proceedings and to harass the respondent. Even after sufficient opportunities were given, the petitioners were not ready for arguments. It is wrong to state that the first petitioner was having dysentery on the date of hearing, that is on 08.08.2017. It is wrong to state that the petitioners 2 to 7 were residing in far away places. C.M.A.No.3 of 2017 was posted for hearing on 11.07.2017. Then 17.07.2017, 18.07.2017, 27.07.2017 and on 08.08.2017. Since there was no representation, the appeal was dismissed on 08.08.2017. The address for all the petitioners are the same. All the petitioners are residing in the same address. In Ex.R10, it is stated that all the petitioners are residing in the suit property. Only to avoid giving share to the respondent and to drag on the case, the petitioners have come forward with this petition and the petition has to be dismissed.

5.After enquiry, the Principal District Judge, Trichy has dismissed the petition. Against the order, the appellant has preferred this appeal on the



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following grounds:

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The respondent has not disputed the ailments of the first appellant. Hence there was no necessity to prove the ailment of the first appellant. The petition in I.A.No.343 of 2017 was filed within 30 days. There was no delay. The appellants 2 to 7 were out of station and they were not able to contact the counsel. In the original suit in O.S.No.1006 of 2016, the respondent herein/plaintiff, has given the address of the first appellant, as the address of the appellants 2 to 7. Based on the plaint address, the learned Principal District Judge, Trichirappalli, has wrongly held that the appellants 2 to 7 were living with the first appellant and on that ground, he has dismissed the I.A.No.343 of 2017. The order was not on merit and it deserves to be set aside.

6.On the side of the appellants it is stated that the original suit was filed for partition and for allotment of 1/6 share of the property in favour of the respondent herein/plaintiff. A petition in I.A.No.863 of 2016 was filed for injunction, restraining the defendants not to put up any superstructure in the first schedule property. The claim of the defendants in the petition, is that there was partition 35 years ago and that the revenue records were mutated and there is no scope of partition at present. In I.A.No.863 of 2016, the II



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Additional Subordinate Court, Trichy, has given a finding that the plea of oral partition can be decided only after full trial and he gave a finding that any further construction will be adverse to the interest of the parties and that there is possibility of the defendants to claim equity and on that basis the lower Court allowed the injunction petition.

7.Against that order, the appellants herein have filed an appeal in C.M.A.No.3 of 2017, on the file of the learned Principal District Judge, Trichy, and that C.M.A.No.3 of 2017, was dismissed for default. A petition in I.A.No.343 of 2017, to restore the C.M.A was filed in time. That petition was dismissed by the learned Principal District Judge, Trichy, on the ground that all the appellants are residing in the same address and the reasons stated in the petition were not satisfactory. Against that dismissal of the petition, the appellant has preferred this appeal.

8.On the side of the appellants, it is stated that the appellants will not claim any equity and the appellants will not create any encumbrance over the property, and on that undertaking, a direction may be given to the trial judge, for disposing the case within a time frame.



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9.On the side of the respondent it is stated that on the undertaking that the appellants wont claim equity on the basis of any superstructure to be constructed in the first schedule property and on the basis of an undertaking, not to create any encumbrance over the property, suitable direction can be given to the trial Court for the disposal of the case.

10.In view of the submissions made by both sides, it is decided that the the undertaking affidavit and the additional undertaking affidavit filed by the appellants, are to be recorded and the trial Court is directed to dispose of the original suit in O.S.No.1006 of 2016 within a period of six months from the date of receipt of copy of this order.

11.With the above direction, this appeal is disposed of. Both the undertaking affidavit shall form part of the order. No costs.

28.11.2022

Index: Yes / No
Internet : Yes / No

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To

- 1.The Principal District Court, Tiruchirappalli.
- 2.The Record Keeper, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

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28.11.2022