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Application No.946 of 2020
in C.S.No.1157 of 1990



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.03.2023

PRONOUNCED ON : 30.03.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Application No.946 of 2020
in C.S.No.1157 of 1990

1.Murugammal
2.Paravathy
3.Kasturi

... Applicants / Plaintiffs
versus

V.P.Pachaiappa Naicker (Died)
P.Chandrasekaran (Died)
1.C.Banumathi
2.C.Balasubramanian
3.C.Sridevi
4.C.Jagadeesan

... Respondents /
Legal Heirs of the 2nd
Defendant

PRAYER: Application filed under Order XIV Rule 8 of O.S. Rules of the High Court, Madras read with Section 5 of the Limitation Act, praying to condone the delay of 7442 days in filing the application to restore the order dated 30.09.1999 dismissing the above suit and to restore the suit to file.

For Applicants : Mr.K.S.Vamsidhar
For Respondents : Mr.T.L.Thirumalaisamy



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ORDER

This application has been filed to condone the delay of 7442 days in filing the application to restore the order dated 30.09.1999 in dismissing the above suit and to restore the same.

2. Heard the learned counsels for the applicants / plaintiffs and the respondents / defendants and perused the materials available on record.

3. The applicants are the plaintiffs and they are sisters. It is submitted by the learned counsel for the applicants that the deceased first defendant was the father of the plaintiffs and the deceased second defendant was their brother; the suit has been filed by the plaintiffs for seeking partition and separate possession of 3/5th share of the suit properties and other reliefs; in the above suit, a preliminary decree was passed in favour of the plaintiffs on 25.11.1991; after the preliminary decree was passed, the defendants 1 and 2 assured them that they would give their rightful shares



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and asked them not to file any final decree application; hence the plaintiffs did not file any final decree application.

3.1. The plaintiffs' father died in the year 1991, leaving behind the plaintiffs and the second defendant as his legal heirs; the second defendant did not fulfil his promise of settling the matter and hence the properties remained un-partitioned; the plaintiffs came to know a few months ago that the second defendant had sold away a few properties; the sale was done without the consent or knowledge of the plaintiffs; the sale does not bind the interest of the plaintiffs or their shares; in the meanwhile, the second defendant died leaving behind the respondents 1 to 4 as his legal heirs; as the plaintiffs could not get in touch with their previous counsel, they engaged a new counsel for filing final decree application; when the new counsel searched the records, he came to know that the suit has been withdrawn as settled out of Court; the plaintiffs never instructed the then counsel to withdraw the suit; the withdrawal memo did not contain the signatures of the plaintiffs and that will not bind the plaintiffs; hence the



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memo dated 23.08.1999 withdrawing the suit and the order of dismissal dated 30.09.1999 should be set aside and the suit should be restored to file.

3.2. In view of the above stated facts, there was a delay in 7442 days in restoring the suit to file; since the applicants came to know recently that the suit has been withdrawn without their consent and without their knowledge, the plaintiffs suspect collusion of their earlier counsel with the second defendant; in a matter, where a preliminary decree was passed no party would file a memo to withdraw the suit and hence the withdrawal itself is null and void.

3.3. Due to the death of their father (first defendant) and brother (second defendant), the shares of the plaintiffs and the second defendant got increased to 1/4th share each instead of 1/5th share; hence the plaintiffs have filed application to restore the suit by setting aside the order dated 30.09.1999 and this application is filed to condone the delay in filing the petition; the applicants never instructed their counsel to withdraw the suit



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and withdrawal memo does not contain the signatures of the plaintiffs; the withdrawal memo is unilateral and unauthorized and it is not binding on the plaintiffs; the joint affidavit dated 13.07.1995 does not have the signatures of the applicants and it is forged one; the applicants are ready to send the alleged joint affidavit to a hand writing expert to be verified; notice dated 22.10.2018 was sent with an intention that the applicants would initiate final decree proceedings in the suit; hence the petition should be allowed.

4. The learned counsel for the respondents submitted that the applicants had suppressed the material facts and filed this application just to enrich themselves with unlawful gain; the applicants filed an application seeking to withdraw the suit as settled out of Court and to return 17 documents filed along with the plaint; the applicants had also issued legal notice on 22.10.2018 by claiming 3/4th share which itself would prove the fact that the applicants are well aware that the present suit is not pending before this Court; so it is false to state that the applicants came to know about the dismissal of the suit only in the year 2020; the applicants have



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approached this Court after 21 years just to get unlawful gain; no proper and acceptable reasons have been given to condone the delay of 7442 days in filing the application to set aside the order dated 30.09.1999; the reasons stated are unreasonable and unexplained.

5. It is strange case where the suit which was withdrawn in the year 1999 on the memo filed by the plaintiffs, was sought to be restored after a delay of 21 years. The applicants, who are the plaintiffs have filed the suit against their father and brother. The father and the brother of the plaintiffs are the defendants 1 and 2 and they are no more now.

6. A joint affidavit was filed on 13.07.1995 in C.S.No.1157 of 1990 and it was signed by the applicants wherein it is stated as follows:-

“3. We submit that now we have amicably settled the suit with our younger brother the second defendant herein. We further submit that we are not interested any more to continue the suit as we have settled the matter out of Court.



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4. We therefore pray that our joint affidavit may be recorded in the above suit and this Hon'ble Court may be pleased to dismiss the above suit as not pressed by us and render justice.”

7. On perusal of records, it is seen that on 30.09.1999 the judgment has been passed by recording the memo filed by the plaintiffs for not pressing the suit. The memo which has been filed as early as in the year 1999 and recorded. However it could not be traced by the Registry. But there is a letter dated 27.09.1999 addressed by the advocate of the plaintiffs to the Registry wherein he has stated that he had received instructions from the plaintiffs that they had amicably settled the matter out of Court and hence the suit should be withdrawn as not pressed. Since the suit has been dismissed on 30.09.1999 as not pressed it should be that letter of the counsel, which was considered as a memo dated 27.09.1999 because it is seen on the letter, the following endorsement is to be made by the Registry “Post it for withdrawal”, the endorsement was signed on 27.09.1999. Subsequently, the suit has been withdrawn. The respondents claim that there



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is a original joint affidavit filed by the plaintiffs dated 13.07.1995 but however the joint affidavit is not available in the Registry. But the suit has been dismissed as withdrawn on the basis of the letter dated 27.09.1999, which has been wrongly quoted as a memo. Now the applicants claim that they have not instructed their counsel to leave the suit as not pressed and he had colluded with the counsel for the second defendant and left it as not pressed.

8. The present application has been filed by the learned counsel for the applicants after 21 years from the date of the disposal of the suit. In fact, subsequent to the disposal of the suit, a memo was filed by the plaintiffs counsel on 08.10.1999 for return of plaintiffs documents and the documents were also received by the counsel after it was ordered by the Court. The original memo for return of documents along with the order of the Court and the acknowledgement endorsement made by the learned counsel for the plaintiffs are available on record. In fact the very same counsel has sent a letter dated 23.08.1999 by stating that he got instructions



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that the suit should be withdrawn as not pressed. It is strange to see that the applicants who have filed the suit did not care to know about the development of the suit nearly for 21 years and all of a sudden filed this application by alleging that the erstwhile counsel had filed papers for withdrawal without their consent in the year 2018.

9. The applicants sent a legal notice to the respondents on 22.10.2018 to the second defendant. In the said reply notice, there is no whisper about the pending suit. The learned counsel for the applicants submitted that the applicants were under the impression of filing final decree application and that is the reason why they did not mention about any pendency of the suit. If the applicants stuck on the preliminary decree that has already been passed in the suit it would be quite natural on their part to mention those details in the notice sent by them in the year 2018. On the date of sending the notice i.e. on 22.10.2018 the applicants did not make any claim about the pending suit or their right to file final decree application.



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10. One fact which is not denied by the applicants is that they were aware of the preliminary decree that has been passed in the suit. If the applicants were not given with their due share in accordance with the preliminary decree they would not have waited for 21 years for filing final decree application. The applicants who have given their vakalat to their advocate and who was authorised by them to withdraw the suit as per the their instructions cannot take advantage of death of both the defendants 1 and 2 and make a fresh claim as though they were not aware of the dismissal of the suit.

11. The reasons stated by the applicants are not satisfactory. Even for the sake of arguments, if it is accepted that the applicants have been waiting after the preliminary decree and restrained from filing the petition for final decree because of the assurance given by their brother that they would give them due shares, such waiting cannot be for decades together. Hence, it is unreasonable on the part of the above applicants to abuse the process of Court and take undue advantage.



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12. In view of the above stated reasons, this application stands dismissed.

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Speaking order / Non-speaking order

Index : Yes / No

Neutral Citation : Yes / No

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R.N.MANJULA, J.

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Pre-Delivery Order made in
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