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CRP.No. 1016 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.02.2023

CORAM:

THE HONOURABLE MRS. JUSTICE V. BHAVANI SUBBAROYAN

Civil Revision Petition No. 1016 of 2021

and

CMP No. 8148 of 2021

Narasimhan Naidu

.. Petitioner

Versus

Venkatammal

.. Respondent

Civil Revision Petition is filed under Section 115 of CPC., praying to set aside the fair and decretal order in I.A.No. 1 of 2020 in O.S.No. 136 of 2013 on the file of Special Court, Additional Special Judge, Krishnagiri, dated 12.03.2021.

For Petitioner : Mr. V. Raghavachari
For Respondent : No Appearance

ORDER

This Civil Revision Petition has been filed to set aside the fair and decretal order dated 12.03.2021 passed in I.A. No. 1 of 2020 in O.S.No. 136 of 2013 on the file of Special Court, Additional Special Judge, Krishnagiri.

2. The revision petitioner herein is the first defendant and the respondent herein is the plaintiff in the suit proceedings.



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3. On a perusal of the records, it is seen that the respondent/plaintiff filed the suit in O.S.No.136 of 2013 before the learned Principal Subordinate Judge, Krishnagiri, for partition and other relief. On notice, the first defendant has filed his written statement, denying all the averments made in the plaint.

4. However, for non-appearance of the counsel for the first defendant, an ex-parte judgment and decree were passed on 07.12.2017 against the revision petitioner/1st defendant. Subsequently, when the Court notice was served on the 1st defendant/revision petitioner herein in the final decree application, he approached his Counsel, but, his Counsel has informed him that he called him over phone to inform about the exparte decree, but he did not attend to his phone call. His counsel has also stated that he had also written a letter intimating about the exparte decree, but according to the first defendant/revision petitioner, no such communication had been received from his counsel. Therefore, the revision petitioner/first defendant asked his counsel to return the case bundle. Accordingly, his Counsel has also given No Objection Vakalath on 13.10.2019 but he did not return the case bundle by stating that it has been misplaced. The revision petitioner/first defendant has therefore engaged the present Counsel on 17.10.2019 and a Vakalath was filed on 21.10.2019, the date of hearing of the final decree application.



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5. The petitioner thereafter, through his new counsel, filed the instant application for condonation of delay of 653 days in filing the application to set aside the exparte decree dated 07.12.2017. It is stated that he ought to have filed the petition to set aside the ex-parte decree within 30 days from the date of exparte decree i.e., on or before 06.01.2018, but the said application was filed only on 21.10.2019. It was reasoned that his erstwhile counsel did not intimate him about the exparte decree and only after he received notice in the final decree application, he came to know about the exparte decree dated 07.12.2017. Thus, the revision petitioner/first defendant would submit that the delay of 653 days in filing the petition to set aside the ex-parte preliminary decree is neither intentional nor wanton. It is also stated that it is not his intention to drag on the suit proceedings especially when he had already filed his written statement through his erstwhile counsel.

6. The plaintiff has filed a counter affidavit in I.A. No. 1 of 2020 stating that it is not correct to state that his previous counsel has not informed him about the ex-parte preliminary decree passed by this Court on 07.12.2017 to the petitioner. This according to the plaintiff is not a valid reason to condone the huge delay. The 1st defendant having filed a written statement did not care to contest the case but simply blame the counsel engaged by him.



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Therefore, the plaintiff prayed for dismissal of the application seeking condonation of delay.

7. After analyzing the pleadings of the parties, the Court below dismissed the said application by the order dated 12.03.2021 on the ground that no valid reason was assigned by the petitioner/1st defendant for condoning the delay of 653 days in filing the petition to set aside the ex-parte preliminary decree. Aggrieved by the said order, the petitioner/1st defendant has filed this Civil Revision Petition.

8. The learned counsel for the revision petitioner/first defendant submitted that the Court below must have appreciated that the petitioner had approached the Court immediately on receipt of the notice in the final decree proceeding by engaging a new counsel. The court below without any basis disbelieved the plea of the revision petitioner that his erstwhile counsel did not intimate him about the exparte decree and he contacted his erstwhile counsel immediately after receipt of the notice in the final decree application. At the request of the revision petitioner, the erstwhile counsel has given change of Vakalath and immediately thereafter, he has requested his new counsel to file the change of Vakalath. Subsequently, the instant application has been filed to



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condone the delay. Thus, the reasons for condonation of delay is reasonable and plausible which the Court below ought to have appreciated and given an opportunity to the revision petitioner to contest the suit. The Court below has not considered this crucial aspect of the case while refusing to condone the delay in filing the application to set aside the exparte preliminary decree. In support of his contention, the learned counsel for the revision petitioner/first defendant placed reliance on a decision of the Honourable Supreme Court in the case of **G. Ratna Raj (Dead) by LRs v. Sri Muthukumarasamy Permanent Fund Limited., and another** in Civil Appeal Nos.2582 & 2583 of 2011, wherein, it has been held in Paragraph No.18 as under.-

"Order 17 Rules 2 & 3,

2. Procedure if parties fail to appear on day fixed.- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. Explanation.- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present.

10. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this



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requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision."

9. It is further stated by the learned counsel for the revision petitioner that the Court below should have seen that the decree passed in the suit cannot be construed as one passed on merits and a bare perusal of the Court proceedings indicates that even on 11.07.2017, the erstwhile counsel did not participate and the matter stood repeatedly adjourned. The erstwhile Counsel did not appear on 28.06.2017, 06.07.2017 and 02.08.2017 and thereafter, the case was posted for arguments on 13.09.2017. The records further indicate that the case was posted for reopening the defendant's evidence on 30.08.2017 and it was adjourned on several dates and ultimately, the evidence on the side of defendant's was closed. The proceedings indicate that the judgment was pronounced only ex-parte. Therefore, the order of the Court below is against the judgment of the Apex Court in **G.Ratna Raj v. Sri Muthukumarasamy Permanent Fund Ltd.**, (2019) 11 SCC 301 @ 306 : (2019) 3 SC (Civ) 725.



10. Learned counsel further stated that the Explanation appended to Order 17 Rule 2 of CPC., shows that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party was present. In any event, according to the learned counsel for the revision petitioner, the court below ought to have given an opportunity to the revision petitioner to contest the suit on merits and the non-consideration of the same required to be interfered with by this Court.

11. Heard the learned counsel for the revision petitioner/first defendant. There is no representation for the respondent/plaintiff. This Court perused the materials placed on record.

12. The respondent/plaintiff has filed the suit in O.S.No.136 of 2013 for the relief as stated below:-

"(a) pass a preliminary decree and judgment for partition and separate possession in respect of 1/9 share of plaintiff into the suit properties;

(b) appoint a Commissioner, directing him to divide the suit properties into 9 equal shares by metes and bounds, allot one such share to plaintiff and put her in separate possession of the same by passing a final decree.

(c) to declare the impugned Gift settlement deed dated



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03.09.2012 created in the name of 2nd defendant is null and void.

(d) to declare the impugned Gift settlement deed dated 23.01.2013 created in the name of 5th defendant is null and void.

(e) to declare the impugned Gift settlement deed dated 23.01.2013 created in the name of 6th defendant is null and void.

(f) to declare the impugned Gift settlement deed dated 22.02.2013 created in the name of 7th defendant is null and void.

(g) to declare the impugned Gift settlement deed dated 13.02.2013 created in the name of 8th defendant is null and void.

(h) granting permanent injunction restraining the defendants 2, 5 to 8 from in any manner alienating or encumbering the suit properties, till partition is effected and the share of plaintiff is separately allotted".

13. In the suit, the revision petitioner/1st defendant has filed his written statement under Order VIII Rule 1 of CPC., and prayed for dismissal of the suit. The written statement was filed on 10.04.2014. It appears that the suit was thereafter listed for hearing on several dates and ultimately an ex parte preliminary decree was passed on 07.12.2017. To set aside the ex-parte decree the instant application in I.A. No.1 of 2020 was filed by the revision petitioner/1st defendant. The trial Court dismissed the application and refused to condone the delay, which has given rise to the filing of the present Civil Revision Petition. In this backdrop, it has to be examined as to whether the



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revision petitioner/1st defendant is entitled to get the delay of 653 days in filing the application to set aside the exparte preliminary decree condoned and whether the delay has been satisfactorily explained by him.

14. The revision petitioner/1st defendant has filed his written statement and he has also engaged his counsel. However, when notice was served in the final decree proceedings, he came to know about the ex-parte decree. It is stated that the petitioner has approached his erstwhile counsel engaged by him, who informed him that he attempted to put him in on notice regarding the exparte decree over phone but he did not attend the phone calls. According to the revision petitioner, he has not received any such phone calls from his erstwhile counsel. Irked by such response, the petitioner sought for Change of Vakalath and accordingly, it was given by his erstwhile counsel. Immediately, on 21.10.2019 the present application has been filed.

15. It is seen from the records that except the revision petitioner/1st defendant herein, other defendants did not choose to contest the suit and the revision petitioner is the only contesting defendant in the suit proceedings. The suit has been filed for a substantial relief of passing of preliminary decree and for other reliefs mentioned supra. The delay of 689 days even though is



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enormous, yet this Court is of the view that the revision petitioner has adduced reasons for the delay in filing the application to set aside the exparte decree. The reasons assigned by the revision petitioner for the delay in filing the application to set aside the exparte preliminary decree cannot be simply brushed aside. Given the nature of relief sought for in the suit and taking note of the fact that the written statement has been filed at the earliest point of time, it cannot be gainsaid that the intention of the revision petitioner is to drag on the suit proceedings. In such circumstances, this Court is of the considered view that doors of justice cannot be shut against the revision petitioner/1st defendant and he must be given one more opportunity to contest the suit proceedings. If such an opportunity is not given, in the peculiar facts and circumstances of the case, much prejudice will be caused to the revision petitioner/1st defendant.

16. Accordingly, the Civil Revision Petition is allowed. The order passed in I.A.No. 1 of 2020 in O.S.No. 136 of 2013 on the file of Special Court, Additional Special Judge, Krishnagiri, dated 12.03.2021, is set aside. The delay of 689 days in filing the application to set aside the exparte preliminary decree dated 07.12.2017 is condoned. The Civil Revision Petition is allowed. No costs. The trial Court is directed to take up the suit for hearing and proceed further in accordance with law. It is however made it clear that



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the revision petitioner/first defendant shall extend his fullest co-operation for expeditiously disposal of the suit. Consequently, connected Miscellaneous Petition is closed.

16.02.2023

Index :Yes/No

Speaking order : Yes/No

Neutral citation : Yes/No

msm

To

1. The Special Judge, [Additional Special Judge], Krishnagiri.
2. The Section Officer, High Court, Madras.



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V.BHAVANI SUBBAROYAN, J.

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