



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2023

CORAM:

THE HONOURABLE Mr. JUSTICE V.LAKSHMINARAYANAN

CRP.No.3853 of 2019

Shanmugam

.. Petitioner

Vs

Nallappan (deceased)

1.Venkatesh

2.Subramani

M/s.Salem Software Techno Development Trust,

Rep by its President,

Veerapandi S.Arumugam (deceased)

3.A.Dhirajlal

S.K.Sengoda Gounder (deceased)

4.Perumal

5.V.S.A Educational and Charitable Trust,

Trust rep by its President,

A.Rajendran

... Respondents

(Notice to the respondents 1 to 4 may be dispensed with, since
no relief has been sought for against him in this present petition)

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 12.07.2019 made in I.A.No.507 of 2017 in I.A.No.44 of 2016 in O.S.No.34 of 2012 on the file of the III Additional District Judge, Salem.

For Petitioner : Ms.K.Komala

For Respondents : Mr.P.Veenitharan for R5
Notice dispensed with for R1 to R4



WEB COPY

ORDER

The plaintiff filed a suit for declaration, partition and separate possession in O.S.No.34 of 2012. In the said suit, the defendants remained ex-parte. Therefore, the suit was posted for recording of ex-parte evidence. On 13.09.2012, when it was listed for recording of ex-parte evidence, the plaintiff did not enter the witness box. Therefore, the suit was dismissed for default. Thereafter, he filed I.A.No.44 of 2016 in order to condone the delay to restore the suit. The number of delay was 864 days. In this application, the learned III Additional District Judge, Salem was pleased to order notice. The plaintiff unfortunately did not take steps in this application on the ground that he was not feeling well and therefore, he could not give instructions to his counsel to take steps. Consequently, I.A.No.44 of 2016 was dismissed for default again. To restore I.A.No.44 of 2016, an application was filed along with condonation of delay of 127 days in I.A.No.507 of 2017. The reason given to this application was that on account of his illness, steps were not taken and consequently, the petition got dismissed.

2. This was strongly opposed by the contesting respondents on the ground that the father has sold the property, pending the litigation to the 5th defendant, and the 5th defendant thereafter sold the property to the 8th



defendant and much water had flown under the bridge and also the reasons that was given by the petitioner to restore to condone the delay is not an acceptable one.

3. The learned trial Judge by way of an order dated 12.07.2019, dismissed the application, against which, the present Revision Petition.

4. Heard Ms.Komala for Mr.T.N.Rangesh Kanna, learned counsel for the petitioner and Mr.P.Veenitharan, learned counsel for the 5th respondent.

5. I have to recollect the settled position of law that the cause of action for suit for partition arises day to day. The bar under Order 9 Rule 9 CPC does not apply for a suit for partition. Any number of suits for partition can be filed on the previous suit being dismissed for default. That being the position, I have to look at the present proceedings in the light of this settled law.

6. The plaintiff claims a share in the property, which had been sold by his father to third parties. He has taken steps to implead all the purchasers to the suit. In this proceeding, unfortunately since he had fallen sick, he could



not record the ex-parte evidence. The fact that the suit was proceeded at the stage of ex-parte evidence itself, should have been a ground for the Court to condone the delay and restore the suit. Be that as it may, it had dismissed the petition on the ground that the plaintiff has not proved that he was suffering from illness.

7. In all cases of illness, a Medical Certificate will not be readily available. Had the delay been condoned, the *lis* would have come to an end by this time. I feel that the illness is a ground for non appearance before the Court. It will be too harsh on part of the Court to expect that the party should present himself before the Court for recording the ex-parte evidence, even if one is sick.

8. In the light of the above discussion, I pass the following order:

(i) I.A.No.507 of 2017 filed to condone the delay of 127 days in filing the restore petition in I.A.No.44 of 2016, is condoned on payment of costs of Rs.5,000/- (Rupees Five Thousand only) to the contesting respondent. The Court below is directed to number the restore application and allow the same.

(ii) Thereafter, the Court below is requested to take up I.A.No.44 of 2016 and allow the application on the petitioner paying costs of Rs.5,000/-



(Rupees Five Thousand only) to condone the delay in filing the application to restore the suit to the contesting respondent.

(iii) On payment of Rs.5,000/- towards costs in I.A.No.44 of 2016, the learned trial Judge will restore the suit i.e., restore O.S.No.34 of 2012 on to its file.

(iv) The time for payment of Rs.5,000/- ordered by this Court in I.A.No.507 of 2017 is four weeks from the date of receipt of a copy of this order. The costs of Rs.5,000/- fixed for I.A.No.44 of 2016 will be paid four weeks thereafter.

(v) Once the suit is restored, the Court shall ensure that the suit is disposed of within a period of six months from the date of restoration.

9. With the above directions, this Civil Revision Petition is allowed. No costs.

26.09.2023

Index:Yes/No
Speaking order/Non-speaking order
vkr

To :

The III Additional District Judge, Salem.



WEB COPY



V.LAKSHMINARAYANAN,J.,

vkr

CRP.No.3853 of 2019

26.09.2023