



CRP(MD).NO.181 of 201

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.02.2023

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

CRP(MD).No.181 of 2013(NPD)

1.Subbiah (died)
2.S.Lakshmi
3.S.Muniyasamy
4.S.Mariammal
5.S.Kaleeswari ... Petitioners
(Petitioners 3 to 5 are brought on record as legal representatives
of the deceased first petitioner vide Court order dated 20.07.2022 made
in CMP(MD).Nos.5645 to 5647 of 2022 in CRP(MD).No.181 of 2013)

Vs.

Renganayagi

... Respondent

PRAYER : Revision Petition filed under Article 115 of the Code of Civil Procedure, to set aside the order dated 22.11.2012 passed in I.A.No.65 of 2011 in unnumbered A.S.No... of 2010 on the file of the Subordinate Court, Kovilpatti.

For Petitioners : Mr.G.Prabhu Rajadurai
For Respondent : Mr.J.Parekhkumar
for Mr.Poovendrarajan



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ORDER

The defendants are the revision petitioners. The defendants are challenging an order passed by the First Appellate Court rejecting an application to condone the delay of 1404 days in filing the first appeal against the judgment and decree in O.S.No.30 of 2005 on the file of the District Munsif Court, Kovilpatti.

2. The revision petitioners/defendants had suffered a decree on 02.11.2006. As per the said decree, the second schedule property was declared as a common pathway for the plaintiff and the defendants. The trial Court has further granted a decree for mandatory injunction directing the defendants to remove the encroachment in the second schedule property. In order to execute the decree, the plaintiff had filed E.P.No.91 of 2007. In the said execution proceedings, amin had filed a report to the effect that all the encroachments have already been removed. Based upon the said report, the execution petition was closed by the trial Court. Challenging the same, the plaintiff/decree holder filed CRP(MD).No.857 of 2010. This Court by order dated 08.02.2021 had allowed the revision and directed the Executing Court to proceed with



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the execution. In the said revision, this Court has appointed an Advocate Commissioner and he has filed a report to the effect that still there are encroachments in the second schedule property.

3. The defendants have chosen to file the present first appeal after the delay of 1404 days before the Subordinate Court, Kovilpatti. In order to condone the delay, the petitioners had filed I.A.No.65 of 2011. In their affidavit, the petitioners had submitted that they were advised to remove certain encroachments from the common pathway. However, not being satisfied with the removal of the said encroachments, the decree holder has approached the High Court for revival of the execution proceedings and hence, they are constrained to file the first appeal. The learned Subordinate Judge by his order has found that the reasons assigned by the petitioners for not filing the appeal in time are not factually correct and they are not legally sustainable. After arriving at such a finding, the condone delay application was dismissed by the learned Subordinate Judge, Kovilpatti. Challenging the same, the present revision petition has been filed.



4. The learned counsel appearing for the petitioners had contended that the decree holder is attempting to execute the decree for an extent in excess of the plaint schedule property by way of reviving the execution petition. Therefore, the petitioners are constrained to file a first appeal challenging the decree of the trial Court. The learned counsel for the petitioners has further contended that the petitioners/defendants were not keeping in good health and hence, they could not prefer first appeal in time.

5. Per contra, the learned counsel appearing for the respondent has contended that after the Advocate Commissioner has filed a report in the High Court, the petitioners have chosen to file this appeal with a delay before the Subordinate Court. There are no *bonafides* in the first appeal and the reasons assigned by them for not filing the appeal in time are not legally sustainable.

6. I have carefully considered the rival submissions made on either side.



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7. It is not in dispute that the petitioners had suffered the decree for mandatory injunction on 02.11.2006. The respondent/decreed holder had filed E.P.No.91 of 2007 to execute the said decree and the same was closed by the executing Court on 07.01.2009 on the ground that the encroachments in the second schedule property have already been removed. Aggrieved over the closure order of the execution Court, the decree holder has filed CRP(MD).No.857 of 2010 before this Court, in which, an Advocate Commissioner was appointed to verify whether still there is any encroachment in the second schedule common pathway. An Advocate Commissioner has filed a report to the effect that still there is encroachment in the second schedule property. Based upon the said report, this Court was pleased to allow the revision and directed the execution Court to proceed with the execution petition.

8. The narration of the aforesaid facts would clearly indicate that the petitioners had not chosen to file any first appeal till a Commissioner was appointed by this Court to verify about the existence of encroachments in the second schedule property. Therefore, the reasons assigned by the petitioner for not filing the first appeal in time



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are not legally sustainable and there are no merits in the said application.

If the petitioners feel that the respondent/decreed holder is attempting for an excessive execution, it is for the petitioners to defend the same in the execution proceedings.

9. With the aforesaid liberty, the Civil Revision Petition is dismissed. No costs.

02.02.2023

Index : Yes / No
Internet : Yes / No

Rmk

To

1. The Sub ordinate Judge, Kovilpatti.



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R.VIJAYAKUMAR ,J.,

Rmk

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Dated:
02.02.2023