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OSA NO.295 OF 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2024

CORAM:

**THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL**

OSA NO.295 OF 2013

M.Indira Devi

... Appellant

Vs.

J.Rajasekaran (Deceased)

2.Baghyalakshmi

3.R.Saraswathi

4.R.Revathy

(RR2 to 4 bring on record as LR's of the
deceased 1st respondent viz., J.Rajasekaran
vide Court order dated 14.06.2022 made
in CMP No.3840/2022 in OSA No.295/2013)

... Respondents

PRAYER: Appeal filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of Letters Patent, praying to set aside the fair and decreetal order dated 26.06.2012 made in Application No.1494 of 2012 in T.O.S.No.3 of 2006.

For Appellant : Mr.K.Harishankar
For Respondents : Mr.M.Kempuraj



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J U D G M E N T

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(Judgment of the Court was made by R.SUBRAMANIAN, J.)

Challenge in this appeal is to the order of the learned Single Judge rejecting an application seeking condonation of delay of 380 days in filing an application seeking to set aside an *ex parte* decree dated 12.07.2010 made in T.O.S.No.3 of 2006.

2.The deceased first respondent sought for grant of probate of a registered WILL dated 21.11.1994 executed by his mother who died on 21.11.1996. The appellant who is one of the granddaughters of the testatrix, filed a caveat opposing the grant. On the caveat being entertained, the Original Petition which was filed as O.P.No.486 of 2004 was converted as T.O.S.No.3 of 2006. The learned counsel for the appellant was informed of such conversion by this Court on 21.01.2006 and a citation was also served, on the learned counsel for the appellant before the Testamentary Court, on 07.08.2006.



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2.1.Since no written statement was filed within the time allowed, the Testamentary Original Suit was proceeded *exparte* and an *exparte* decree came to be passed on 12.07.2010. The plaintiff in the Testamentary Original Suit was examined as P.W.1 and an attesor was examined as P.W.2. The Testamentary Court found that the evidence of P.W.1 and P.W.2, coupled with the fact that the WILL is a registered document, would demonstrate that the WILL has been executed by the testatrix while she was in a sound disposing state of mind. On the said conclusion, the Suit was decreed as prayed for on 12.07.2010.

2.2.Almost a year later, an application was filed on 26.08.2011 seeking condonation of delay of 380 days in filing the application to set aside the *exparte* decree. The reasons assigned for the delay are that the counsel for the appellant did not inform the appellant about the service of notice of conversion and the citation by this Court. It was also her contention that she came to know of the grant only in February 2011, when the deceased plaintiff had required her to participate in the negotiations for partitioning the property. She would also claim that the deceased plaintiff had assured her that he would take steps for a



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negotiated settlement of the entire issue and for an equal partition of the properties.

2.3.It is the claim of the appellant that she believed her uncle and did not take steps to have the *exparte* decree set aside till August 2011. This application was resisted by the respondent contending that the application lacks *bonafides* and the reasons that are assigned would not amount to sufficient cause within the meaning of Section 5 of the Limitation Act, 1963. The learned Single Judge who heard the application found that the reasons assigned do not amount to sufficient cause for condonation of such lengthy delay of 380 days. The learned Single Judge found that at every stage, the counsel for the appellant was served with notice of the proceedings of this Court and the appellant cannot wriggle out of the obligation to be vigilant by blaming the counsel.

3.Various judgments of this Court as well as the Hon'ble Supreme Court on the duty of the litigant to keep track of the proceedings were also relied upon by the learned Judge to conclude that the reasons assigned would not amount to sufficient cause. On the said conclusion, the learned Single Judge dismissed the application.



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4.We have heard Mr.K.Harishankar, learned counsel appearing for the appellant and Mr.M.Kempuraj, learned counsel appearing for the respondents.

5.Mr.K.Harishankar, learned counsel appearing for the appellant would vehemently contend that the learned Single Judge ought to have taken a liberal view on the question of WILL. No doubt, a litigant is duty bound to check on the happenings in Court, but at the same time, the absence of communication from the counsel also could contribute to the delay. The learned counsel also attempts to contend that the grant itself was not right since there were no reasons given justifying the delay in seeking the grant. The learned counsel would also submit that the title of the testatrix of the properties is also not conceded by the parties.

6.Contending contra, Mr.M.Kempuraj, learned counsel appearing for the respondents would submit that the counsel for the appellant cannot be heard to contend that the original grant itself was not right in an appeal against an order dismissing his application for condonation of delay. He would also point out that the question of title



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cannot be gone into in the testamentary proceedings and it is for the appellant to initiate appropriate proceedings, if she wants to question the title of the testatrix. On the delay, the learned counsel would submit that except blaming the counsel, there is no other reason assigned in the affidavit.

7.This Court and the Hon'ble Supreme Court have repeatedly held that a litigant cannot be allowed to blame his or her counsel and seek condonation of delay, thereby suppressing the negligence on his or her part in not attempting to know what is happening to the litigant for over a long period.

8.We have considered the rival submissions.

9.As rightly pointed out by Mr.M.Kempuraj, learned counsel appearing for the respondents, except blaming the previous counsel, there is no other reason set out for the delay in the affidavit filed in support of the application. While it is admitted that the appellant became aware of the passing of the *ex parte* decree in February 2011, no steps were taken till



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August 2011 to have it set aside. This delay is sought to be explained by claiming that the deceased plaintiff assured them of a settlement. We do not find any evidence to that effect having been placed before the learned Single Judge. Of course, the Hon'ble Supreme Court has held that there is a need for the Courts to liberal in condonation of delay, but at the same time, such unexplained and inordinate delay cannot be condoned as a matter of course, which will amount to encouraging the litigants to prolong the litigation. Even this litigation on hand has been prolonged for over 20 years for no good reason.

10. The reasons assigned in the affidavit filed in support of the application, in our opinion, are far from convincing. Even assuming there was a failure on the part of the counsel to have informed the appellant, after coming to know about the *ex parte* decree granted in February 2011, no steps were taken for nearly six months till 26.08.2011, when the application seeking condonation of delay was filed in Court. We are therefore unable to fault the learned Single Judge for having held that the delay has not been explained and therefore, we need not interfere with the order of the learned Single Judge. As regards the contention that the



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testatrix did not have title for the entirety of the property that she has bequeathed, this is not a proceeding in which such plea could be gone into. It is open to the appellant to take appropriate proceedings if it is available in law.

11.The appeal therefore fails and it is accordingly, dismissed.

No costs.

[R.S.M., J.]

[R.S.V., J.]

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