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C.R.PD.No.2928 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

C.R.PD.No.2928 of 2022

and

C.M.P.No.15889 of 2022

K.V.Murugesan

... Petitioner

Vs.

1.Palaniammal

2.R.Shanmugam

... Respondents

PRAYER: Revision filed under Article 227 of the Constitution of India praying to set aside the fair and decretal order made in I.A.No.3 of 2022 in I.A.No.328 of 2018 in O.S.No.311 of 2008 on the file of the II Additional Subordinate Court, Erode.

For Petitioner : Mr.K.Karthikeyan

For Respondents : Mr.V.S.Kesavan

### **ORDER**

O.S.No.311 of 2008 is a suit for partition and separate possession on the file of the II Additional Subordinate Judge at Erode.



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2. The suit came to be decreed by the learned Subordinate Judge and an appeal preferred there from was also unsuccessful. In order to obtain an executable decree, an application was taken in I.A.No.328 of 2018 by the plaintiffs. In the said application, several opportunities were granted to the 1<sup>st</sup> defendant to file his counter. He had entered appearance but still did not go ahead and object to the application. The Court, left with no other option after waiting for a period of 3 years, set the petitioner *ex parte* on 18.02.2021. In order to set aside the *ex parte* order, an application was filed under Order IX Rule 7 of the Code of Civil Procedure. The reason that was given is that in February 2021, the plaintiff was suffering from 'heavy attack of cold and fever and other consequences'. Hence, he stated that the *ex parte* order must be set aside.

3. A detailed counter was filed by the plaintiffs stating that the reason afforded has not been substantiated and it is a false one. Despite the fact that alleged signatures of the petitioner was denied, the petitioner did not bother to cross the witness box and substantiate the same. In other words, the only record available before the Court is the affidavit that had been filed by the petitioner. Apart from that, the petitioner did



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not approach the Court immediately. He was set *exparte* on 18.02.2021 but filed the affidavit only on 20.01.2022 , that is after a period of 11 months. The learned trial Judge taking all these aspects into consideration dismissed the petition filed under Order IX Rule 7.

4. Mr.V.S.Kesavan would vehemently plead that few of the personal properties of the 1<sup>st</sup> defendant have been included in the suit schedule mentioned property. Despite the same, there has been a decree. First, a final decree Court cannot go beyond a preliminary decree. Further, the said fact has not been pleaded anywhere in the affidavit filed in support of the application to set aside the *exparte* order. The factum that the petitioner did not enter the witness box and support the history of sickness that had been projected by him makes me look against him. Under Order IX Rule 7, the strict rules of Section 5 of the Limitation Act do not apply. “Sufficient cause” need not be proved. Order IX Rule 7 requires that the petitioner assigns a 'good cause' for not being present on the date which he was set *exparte*. Unsubstantiated statement of fever and cold is not a cause let alone being a “good cause”.

5. In the light of the above discussion, I do not find any reason to



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interfere with the order of the learned II Additional Subordinate Judge at Erode. The order in I.A.No.3 of 2022 in I.A.No.328 of 2018 in O.S.No.311 of 2008 dated 04.08.2022 stands confirmed.

6. Mr.V.S.Kesavan for the respondents submits that the Advocate Commissioner has already visited the suit property and submitted a report. The suit, having been pending for more than 16 years, the learned II Additional Subordinate Judge, Erode is requested to take up this case on a priority basis and dispose of it within a period of four months from the date of receipt of a copy of this order.

7. With the above observation, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

03.04.2024

Index : Yes / No  
Speaking Order : Yes / No  
Neutral Citation : Yes / No  
Sgl



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To

WEB COM The II Additional Subordinate Court,  
Erode.



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V.LAKSHMINARAYANAN, J.

Sgl

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