



C.R.P.(MD)No.1319 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 10/01/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

C.R.P (MD)No.1319 of 2023

and

CMP (MD)No.6577 of 2023

G.Senthilvel Pandian : Petitioner/Appellant/
Petitioner/3rd Defendant

Vs.

1.Petchiyammal
2.Minor Durairaj
3.Minor Maheswari
(Minors Respondents 2 and 3
through their Mother/Next
Guardian-1st Respondent) : Respondents 1 to 3/
Respondents 1 to 3/
Respondents 1 to 3/
Plaintiff Nos.1 to 4
4.Shanmuga Sundaram
5.Chinna Thambi : Respondents 4 and 5/
Respondents 4 and 5/
Respondents 4 and 5/
Defendants 1 and 2

PRAYER:-Civil Revision Petition has been filed under section 115 of the Civil Procedure Code to set aside the fair order and decreetal order passed by the Principal District Judge, Tirunelveli made in C.M.A No.22 of 2022, dated 06/01/2023 confirming the order in IA No.5 of 2021 in O.S No.35 of 2014 passed by the Subordinate Judge, Ambasamudram, Tirunelveli District.



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For Petitioner : Mr.M.Kumar
For Respondents 1 to 3 : Mr.R.Sridharan
For 4th Respondent : died
For 5th Respondent : No appearance

O R D E R

This civil revision petition is filed seeking to set aside the fair order and decreetal order passed by the Principal District Judge, Tirunelveli, in CMA No.22 of 2022, dated 06/01/2023, confirming the order passed in IA No.5 of 2021 in O.S No.35 of 2014 by the Subordinate Judge, Ambasamudram, Tirunelveli District.

2.The facts in brief:-

A suit in O.S No.35 of 2014 was filed by the first respondent herein Petchiyammal for herself and on behalf of her minor children against three persons seeking the relief of declaration that the suit property absolutely belongs to them; for consequential relief of recovery of possession by removing the 3rd defendant from the encroachment made by him in the suit property; for declaring that the sale deed, dated 19/04/2011 standing in the name of the 3rd defendant is null and void; and for costs.



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3.After full trial, the suit was decreed declaring that the property absolutely belongs to Petchiyammal and her children and the third defendant was required to vacate the premises and hand over the possession within two months. Similarly, the sale deed standing in the name of the 3rd defendant was declared to be not binding upon the plaintiffs.

4.Before the trial court, the respondents 1 and 2 herein remained *ex-parte*, so also the 3rd defendant remained *ex-parte*. To set aside the *ex-parte* decree and judgment, the 3rd defendant, who is the petitioner herein filed I.A No.5 of 2021 before the trial court. That came to be dismissed. Against the same, CMA No.22 of 2022 was preferred by this petitioner before the Principal District Judge, Tirunelveli. That was also came to be dismissed.

5.Against which, this civil revision petition has been preferred on the ground that the reasons set out in the impugned petition was not properly considered, either by the trial court or by the appellate court.

6.Heard both sides.



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7.The learned counsel appearing for the petitioner would submit that the decree has been obtained against the dead person; at the time of hearing of the suit itself, the 1st defendant namely Shanmuga Sundaram was dead. So according to him, the decree itself is nullity. To show the same, the death certificate of the 1st defendant was produced. Wherein, we find that Shanmuga Sundaram expired, on 12/08/2012. The suit was filed in the year 2014 showing the 1st defendant as alive.

8.Per contra, it is the contention of the respondents 1 to 3 that during trial, summon was issued to the 1st defendant. But the 1st defendant, after receiving the summon, failed to appear. According to him, the record of proceedings of the trial court will indicate that on the date of filing the suit, the 1st defendant was alive.

9.But this court is handicapped with the records. When the death certificate indicates that he is reported to be dead, on 12/08/2012, how the summon could have been served upon him is not understandable.

10.But this was not brought to the notice to the trial court, while filing the petition in IA No.5 of 2021



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by the 3rd defendant. So it is seen that the petitioner was not also aware of the death of the 1st defendant, so also the plaintiffs. It appears that it is a mistake committed by the parties and also by the Courts.

11.The learned counsel appearing for the petitioner would submit that the death of the 1st defendant was brought to his notice only recently, thereafter only, they obtained the death certificate.

12.Now whatever it may be, damage has also been done. So the question which arises for consideration whether because of that damage, the petitioner can take advantage.

13.Now let us go to the pleadings.

14.It has been stated that originally the suit property belongs to the 1st defendant namely Shanmuga Sundaram by way of settlement deed. One Govindapandian purchased the property from the defendants 1 and 2, on 29/09/1995. Later, the defendants 1 and 2 permitted to continue in possession of the property on rental basis by way of the sale deed, dated 09/04/2008. The plaintiffs became the owner of the property, after the death of Govindapandian.



15.Later, the defendants 1 and 2 executed a sale deed in respect of the property to the 3rd defendant. Now the 3rd defendant is in occupation. So this is the sub and substance claim of the respondents herein.

16.Now the 3rd respondent is claiming title over the property through the defendants 1 and 2. Now the 2nd defendant also remained *ex-parte*. He also did not appear before this court, in spite of receipt of the notice. His name also printed in the cause list. So the petitioner has to work out his remedy lonely.

17.The respondents 1 to 3 would submit that this is not the first time, such an application filed by the petitioner in order to set aside the *ex-parte* order. According to them, this is the 5th application.

18.Originally, the petitioner remained *ex-parte*, after receipt of the summon. So, he was set *ex-parte*. Later, he filed an application to set aside the *ex-parte* order along with the written statement, on 20/01/2015. The trial was commenced, on 19/10/2016. PW1 was examined in chief. In spite of repeated adjournments, this petitioner did not come forward to cross examine PW1. So he again set *ex-parte*, on 04/09/2017. Again, he filed an



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application in I.A No.680 of 2017 to set aside the *ex-parte* order. That came to be allowed, on 14/06/2018.

19.Later, PW1 was cross examined in part, on 14/06/2018. Thereafter, it was adjourned for further cross examination. In spite of adjournment, he again failed. So again, he was set *ex-parte*, on 29/08/2018. Again, another application was filed to set the *ex-parte* order in IA No.671 of 2018. That was also allowed, on 30/01/2019. Later also, this petitioner failed to cross examine PW1.

20.Thereafter, he filed an application IA No.1 of 2019 seeking permission to file additional written statement. That was allowed, on 23/10/2019. Additional issues were framed. Again posted for cross examination of PW1 on various dates such as 04/12/2019, 18/12/2019 and 22/01/2020. Again the petitioner failed. Again, an *ex-parte* order was passed, on 21/02/2020. Again I.A Nos.2 of 2020 to 4 of 2022 were filed by the petitioner to set aside the *ex-parte* order and for cross examination of witnesses.

21.Again, the case came up for cross examination of PW1 and PW2 on various dates, such as 01/12/2020 and



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16/12/2020. Again this petitioner failed. Again, ex-parte order was passed, on 16/12/2020. Then only the case was decreed, on 05/01/2021.

22.By pointing out this, the learned counsel appearing for the respondents 1 to 3 would submit that the conduct and attitude of this petitioner in dragging on the matter endlessly should not be permitted.

23.No doubt that a party to the litigation should not be permitted to take fullest advantage of gaining time showing one or other reasons. Now the reason for his failure has been stated that he has to travel to various places because of his job nature. So frequently contacted his Advocate, but the Advocate failed to inform him. So, there is a failure.

24.The learned counsel appearing for the respondents 1 to 3 would rely upon the judgments viz., (i) *Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others* [(2023)12 SCC 649]; and an unreported decision of this court made in *Kasirajan Vs. Sivalingam* (CRP(NPD)No.2401 of 2016, dated 04/11/2020) for the purpose of argument that unless proper reason is assigned, the petitioner must be non-suited.



25.Consideration for considering this sort of petition is now more or less well settled. In **Esha Battacharjee's** case, the following principles have been dedicated.

"15.From the aforesaid authorities the principles that can broadly be culled out are:

(i)There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii)The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii)Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv)No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.



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(v) *Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*

(vi) *It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

(vii) *The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

(viii) *There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

(ix) *The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*



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(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.



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will cooperate for disposal in future. In all the occasions, the petitioner not only failed and the respondent herein, but also even failed the court.

27.Considering the attitude of the petitioner and also considering that no proper reason assigned by the petitioner to set aside the *ex-parte* decree, the trial court dismissed the same as confirmed by the appellate court.

28.I find absolutely no illegality or error in jurisdiction in the order passed by the trial court as confirmed by the appellate court. So, I find no reason to entertain this petition.

29.In the result, this civil revision petition stands **dismissed**. No costs. Consequently, connected Miscellaneous Petition is closed.

10/01/2024

Index:Yes/No
Internet:Yes/No
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To,

- 1.The Principal District Judge,
Tirunelveli.
- 2.The Subordinate Judge,
Ambasamudram,
Tirunelveli.



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G.ILANGOVAN, J

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