



A.No.4569 of 2024
in C.S.No.66 of 2021

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :21.12.2024

Pronounced on : 07.01.2025

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

A.No.4569 of 2024

in

C.S.No.66 of 2021

1.S.Saradha

2. S.Karunakaran

... Applicants

/versus/

1. G.Naveen Kumar

2. G.Nandhini Devi

3. T.Swathilakshmi

4. T.Rajkumar

... Respondents

Prayer: Application has been filed under XIV Rule 8 of the OS Rules r/w Section 5 of the Limitation Act to condone the delay of 229 days in filing application to set aside the judgement and decree dated 26.09.2023 in C.S.No.66 of 2021.

For Applicants : Mr.Sam Jayaraj Houston

For Respondents : Mr.R.Thiagarajan
for R1and R2



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ORDER

This application has been filed by the applicants to condone the delay of 229 days in filing application to set aside the judgement and decree dated 26.09.2023 in C.S.No.66 of 2021.

2. Mr.G.Saman purchased a property with his own funds on 05.04.1960. He executed a Will dated 08.01.1987 and died on 14.05.1987. In the Will, Mr.G.Saman named his son Thiru.Gnanasekar, as an executor. As per the Will, he bequeathed the 'A' schedule property with a life interest to his wife Saradha and after her life to his two sons Gnanasekar and Thiyagarajan without any power of alienation. After their lifetime, the property to be equally divided among the sons of Gnanasekar and Thiyagarajan with full power of alienation. The income from the house property was directed to be utilised for discharging the loan availed from Egmore Benefit Society. In respect of 'B' schedule property, the testator had sold half of it out of 35½ cents and retained the remaining half. He wished to sell two grounds of it and meet out the expenses of his three daughters' marriage and after meeting those marriage expenses, the funds are to be utilised for construction of the upstairs portion of his house at No.35, Vathiyar Kanda Pillai



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Street, Sollai. After alienating two grounds in the 'B' schedule property, the remaining portion shall be utilised by his two sons for their business purposes, till their lifetime without power of alienation and after their lifetime to be divided equally among the children of the two sons.

3. Thiru.Gnanasekar being the executor had obtained probate from this Court *vide* order dated 15.11.1988 in O.P.No.449 of 1998. The Will was acted upon and the executor had sold a portion of the 'B' schedule property and spent for the marriage expenses of the three daughter of G.Saman.

4. Based on the Will, the property is to be apportioned among the sons, subject to the life interest given to wife and children of Gnanasekar, namely, G.Naveen Kumar and G.Nandhini Devi. It is pertinent to note that, under this Will, Karunakaran one of the son of G.Saman was not given any property under the Will. Gnanasekar had filed a partition suit before this Court in C.S.No.66 of 2021.

5. The defendants namely, Saradha wife of G.Saman, Karunakaran, the third son of G.Saman, T.Swathilakshmi, the daughter of the second son



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Thiyagarajan and Raju Kumar @ Rajviay Kumar, the son of Thiyagarajan were parties to the suit.

6. The suit for partition was filed by the grandchildren for the legatees under the Will of G.Saman, alleging that while the 2nd defendant, Karunakaran was disinherited from acquiring any property from his father under the Will, he in collusion with his mother (1st defendant), trying to alienate the property. The suit was not contested by the defendants. Though, 1st and 2nd defendants entered appearance, they did not file any written statement. Based on the evidence let in by the plaintiffs, this Court granted relief of declaration that the plaintiffs are entitled to half share in the suit schedule property, subject to the life interest of the 1st defendant and consequential permanent injunction restraining the defendants from encumbering or alienating the suit property. Thus, this Court, taking into consideration the probate granted and the life interest vested with the wife and two sons, partially allowed the suit, declaring the right of the plaintiffs in the suit schedule property. The decree of declaration was passed on 26.09.2023.

7. In such circumstances, the defendants 1 & 2 had taken out an application to condone the delay of 229 days in filing the application to set aside



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the *exparte* decree passed in C.S.No.66 of 2021, dated 29.09.2023. In this application, the 1st defendant, who is the wife of testator G.Saman had alleged that the Will of her husband Saman was fraudulently obtained by her sons, Gnanasekar and Thiagarajan, while her husband was ill. After his death, suppressing the Will, her signature was obtained by misrepresentation and used for getting probate of the Will. When the suit for partition in C.S.No.66 of 2021 was filed and summons served on her, she engaged an Advocate to represent her. However, due to her age-related illness, she would not follow up the case and his son/the 2nd defendant also not able to follow up the case due to his ailment. It was only in the month of December 2022, when she contacted her counsel, she came to know that they have been set *exparte* on 30.03.2021. Only in the month of December 2023, they were able to collect all the papers and file this application to set-aside the decree passed on 26.09.2023.

8. The application is strongly opposed by the plaintiffs stating that the applicants were aware of the probate proceedings as well as the follow up



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execution of the Will by an executor. After 40 years, trying to reopen the issue, despite enjoying the benefits of the Will. The marriage of three daughters was solemnised after alienating half of the 'B' schedule property, remaining sale consideration was used for putting up additional construction in the property mentioned under the Will. The disinherited son who had fallen out of grace of the father due to his conduct inviting disgrace to the family now instigating the mother and want to extort money.

9. Heard the Learned Counsels and records perused.

10. Though the application to condone delay of 229 days in filing the application to set aside the *ex parte* decree passed against them appears innocuous, there is no material to able that after entering appearance through Counsel, the applicants were unable to follow up the case. In fact, though the suit for partition for larger relief for declaration and effect division of the property into two half shares and put them in possession of one-half, subject to the interest of first defendant and her sons, Gnanasekar and Thiyagarajan.



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11. This Court, taking into consideration that the division can be effected only after the demise of the life interest holders, had restricted the relief to an extent of declaring the right of the plaintiffs in the suit schedule property as residual legatee. The 1st applicant/Saradha along with his two sons and three daughters had given a consent affidavit for grant of probate in favour of her son Gnanasekar who was appointed as an executor by the testator G.Saman. Based on the consent affidavit, probate granted on 15.11.1988. It is too late for the day to turn turtle and claim that the consent was obtained by misrepresentation, after deliberately allowing the executor to obtain probate and for him to act upon the Will. Since their attempt to alienate the property contrary to the Will was aborted by the residual beneficiaries in C.S.No.66 of 2021, attempt is made by the applicants to circumvent the probate granted 40 years ago.

12. The reason to condone delay, citing health grounds but without any substantial medical records which could have prevented them from actively participating in the proceedings, leads this Court to conclude that the application to condone delay deserve to be dismissed for want of merits.



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13. Accordingly, A.No.4569 of 2024 is dismissed.

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Index :Yes/No.
Internet :Yes/No.
Speaking Order/Non Speaking order
bsm

DR.G.JAYACHANDRAN,J.

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Delivery Order made in
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