

Kesavan Vs. Kodiyan and ors.

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SooperKanoon Citation : sooperkanoon.com/828873

Court : Chennai

Decided On : Mar-12-1998

Reported in : (1998)2MLJ708

Appellant : Kesavan

Respondent : Kodiyan and ors.

Judgement :

ORDER

M. Karpagavinaygam, J.

1. The petitioner is the plaintiff. The respondents are the defendants 4, 8 and 9 respectively.

2. The plaintiff filed a suit in O.S.No. 476 of 1992 on the file of Principal District Munsif's Court, Ulundurpet for partition against the defendants 1 to 10. The suit was decreed ex parte. The respondents filed a petition under Section 5 of the Limitation Act in I. A.No. 893 of 1995 to condone the delay of 852 days in filing the petition to set aside the ex parte decree. A conditional order was passed on 9.1.1997 by the lower court. On complying with the condition imposed, the petition came to be allowed on 21.2.1997. The plaintiff, the petitioner herein has challenged these impugned orders in these revisions before this Court.

3. Mr. Dhanyakumar, the counsel for the petitioner, while attacking the impugned orders, would bring to the notice of this Court that a similar petition to condone the delay filed by the first respondent, the fourth defendant, was earlier dismissed and that the second application for identical relief is not maintainable. He would further submit that though as far as the respondents 2 and 3, the defendants 8 and 9 are concerned this is the first application, there is no proper explanation given in the said application to condone the delay and as such, the impugned orders are liable to be set aside:

4. On the other hand, Mr. Lakshmi Narayanan, the counsel appearing for the respondents, on the strength of the decision in *Samir Sgnihha v. Pranaya Bhusan* : AIR1989 Ori185 , would argue that in a suit for partition, every defendant stands in, the position of a plaintiff and is entitled to get along with the plaintiff a share in the joint family properties and when there is a preliminary decree for partition in respect of some defendants, certain rights flow in favour of those defendants only and that in such an event, if the preliminary decree passed ex parte in this case as against some of the defendants is not set aside by condoning the delay and if the said decree is allowed to survive, while other defendants have to contest the suit, then it would give rise to an innocuous, anomalous and inconsistent position. It is his further contention that the earlier application for condoning the delay was dismissed only as far as the first respondent is concerned and that objection would not be applicable to the other respondents and that while there is no legal impediment to condone the delay and set aside the ex parte decree passed as against respondents 2 and 3, the principle as enunciated in : AIR1989 Ori185 would be squarely applicable to the first respondent also and that therefore, the impugned orders are justified and they are not liable to be disturbed.

5. I have carefully considered the submissions of the counsel for both the parties and gone through the petitions and other records .

6. The reading of the impugned orders would make it clear that the trial court was not at all satisfied with the reasons given by the first respondent for condoning the delay of 852 days. In fact, in the counter it was specifically stated by the plaintiff that the earlier application filed by the first respondent, the fourth defendant, to

condone the delay was dismissed. Despite these factors, the trial court has allowed the application without any valid reason. On the contrary, the finding given by the trial court in the impugned orders is that there is no proper explanation for the said inordinate delay.

7. Though there is no difficulty in accepting the principle laid down in *Samir Snighha v. Pranaya Bhusan* : AIR1989 Ori185 , with reference to the necessity to set aside the ex parte preliminary decree in a suit for partition in respect of some defendants, I am unable to apply the said principle in favour of the first respondent, because it was brought to my notice by the counsel for the plaintiff/petitioner that the preliminary decree has been passed as against all the defendants. In the said situation, in a way the said citation shown by the counsel for the respondents would help the plaintiff to hold the view that the preliminary decree should not be disturbed in respect of some defendants alone.

8. It is also to be noted that the second application to condone the delay of 852 days was filed by suppressing the fact of the dismissal of the earlier petition. In fact, the earlier application was filed only with 362 days of delay. But, the second application was filed with the total delay of 852 days with the reasons which were quite contradictory to the reasons given in the earlier petition. It is unfortunate that this has not been taken into consideration by the lower court while passing the impugned orders. 9. In the result, the revision petitions are allowed by setting aside the impugned orders. There is no order as to costs. Consequently, no further order is necessary in C.M.P.No. 8006 of 1997.