

K.Loganathan Vs. K.Sahadevan

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Court : Chennai

Decided On : Feb-25-2013

Judge : C.S.Karnan

Appellant : K.Loganathan

Respondent : K.Sahadevan

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

25. 02.2013 CORAM THE HON'BLE MR.JUSTICE M.JAICHANDREN and THE HON'BLE MR.JUSTICE M.M.SUNDRESH O.S.A.No.406 of 2012 and M.P.No.1 of 2012 K.Loganathan .. Appellant Vs 1. K.Sahadevan 2. S.Delli Babu 3. S.Haribabu 4. S.Gokulakrishnan 5. K.Jayaraman .. Respondents Appeal under Order XXXVI Rule (9) of O.S. Rules read with Clause 15 of the Letters Patent, against the fair and decretal order dated 10.08.2012 passed in O.A.No.3408 of 2012 in C.S.No.874 of 2004. For Appellant : Mr.P.Rathanavel For respondents : J.R.K.Bhavanantham for RR1 to 4 : Mr.V.Manohar for R-5 * * * * *

(Judgment of the Court was delivered by M.M.SUNDRESH, J.) This appeal has been filed by the appellant, who is defendant No.2 in the suit and applicant in Application No.3408 of 2012 in C.S.No.874 of 2012. By order dated 10.08.2012, the learned single Judge was pleased to dismiss the said application. 2.The respondents have filed a suit for partition and separate possession. The appellant has been set ex parte due to non-appearance of his counsel and thereafter, an ex

parte decree was passed. An application was filed by the appellant in Application No.3408 of 2012, specifically contending that the appellant's counsel could not be present when the matter was taken up for hearing, as his mother had died on 06.04.2010. It is further stated in the affidavit that the counsel for the appellant went to Salem to attend the death ceremony and due to the prevailing custom, he had to stay in the said place for 30 days, to perform the required ceremonies.

3.The learned single Judge dismissed the application filed by the appellant on the ground that the appellant has not given sufficient reason for setting aside the ex parte decree and the application has been filed with a delay of 714 days. Challenging the same, the present appeal has been filed.

4.The learned counsel for the appellant would submit that the reasoning given by the learned single Judge is factually incorrect. The fact that the counsel's mother died is not in dispute. There is no serious controversy over the same. Further more, the learned single Judge has committed a mistake in misconstruing the application filed to condone the delay of 714 days in representing the application to set aside the ex parte decree, as that of one filed to condone the delay in filing the application to set aside the ex parte decree. Therefore, considering the above said fact and taking note of the fact that the suit is for partition and separate possession, the appeal will have to be allowed.

5.Per contra, the learned counsel appearing for the respondents would vehemently contend that there is no bona fide in the application filed. The learned single Judge has rightly taken into consideration all the relevant materials while dismissing the application and that the appellant was not present on three hearings. The learned counsel also made reliance on the following judgments:- (i) SALIL DUTTA vs. T.M. AND M.C. PRIVATE LTD., (1993) 2 SCC 185.and (ii) PARIMAL vs. VEENA ALIAS BHARTI, (2011) 3 SCC 545.

6.The suit filed is for partition and separate possession. It is trite law that in a suit for partition, either party has got the status of a plaintiff. The appellant has filed the application to set aside the ex parte decree within the time prescribed before the learned single Judge specifically making an averment that his counsel could not be present due to sudden demise of his mother. This fact has not been seriously disputed. The learned single Judge also did not find that such averment made by the appellant was not correct. However, what persuaded the learned Judge to dismiss the application was that he has misconstrued the facts in holding

that there was delay of 714 days in filing the application and therefore, the application lacks bona fides. 7.However, it is to be seen, as pointed out by the learned counsel for the appellant, that in para 5 of the order it has been observed that the application was filed to condone the delay of 714 days in representing the application, which has been filed to set aside the ex parte decree. It is further to be seen that the said application seeking condonation of delay in representing the application was also allowed on terms. The appellant has complied with the said order. Therefore, the reasoning of the learned single Judge, in our view, is not factually correct. 8.It is also settled position of law that, when a vakalat has been filed by the counsel appearing for the defendant or the plaintiff, as the case may be, and the said counsel has not appeared, it is incumbent upon the Court to issue notice to the parties concerned, vide judgment of the Hon'ble Apex Court in *MALKIAT SINGH vs. JOGINDER SINGH*, AIR 199.SC 258.The said method has not been adopted while setting the appellant ex parte. Even otherwise, the appellant was said to be absent for only three hearings. The hearings were between 23.04.2010 and 28.04.2010, within a span of seven days. 9.The judgments relied upon by the learned counsel appearing for the respondents, in our considered view, are not applicable to the facts of the case on hand. In the judgment rendered in *Salil Dutta vs. T.M. And M.C. Private Ltd.*, (1993) 2 SCC 185.supra, the issue was as to whether an improper advice of an advocate can be taken into consideration while dealing with an application filed under Order 9 Rule 13 CPC. The said situation is not available to the case on hand. Similarly, in *Parimal vs. Veena Alias Bharti*, (2011) 3 SCC 545.supra, the Hon'ble Apex Court was considering the meaning of sufficient reason in the application filed under Order 9 Rule 13 CPC. As we are convinced that there are sufficient reasons for condonation of delay and in the absence of lack of bona fides on the part of the appellant, we are of the considered view that the appeal will have to be allowed, particularly when the suit is filed for partition and separate possession. 10.Accordingly, the Original Side Appeal is allowed. However, we make it clear that taking note of the fact that the suit is pending from 2004 onwards, the parties are directed to co-operate with the speedy disposal of the trial. No costs. Consequently, connected M.P. is closed. (M.J., J.) (M.M.S.,J.) 25.02.2013 Index : Yes Internet : Yes sra M.JAICHANDREN J.

and M.M.SUNDRESH, J.

(sra) O.S.A.No.406 o

25. 02.2013

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