

(2014) 01 MAD CK 0225

In the Madras High Court

Case No : C.M.A. Nos. 2201 and 2202 of 2012 and M.P. No. 1 of 2012

Thaiyalnayaki (died) and Others

APPELLANT

Vs

Muthu

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 22, Order 41 Rule 21, Order 41 Rule 41, 151

Citation : (2014) 2 MLJ 445

Hon'ble Judges : G.M. Akbar Ali, J

Bench : Single Bench

Judgement

G.M. Akbar Ali, J.—Civil Miscellaneous Appeals filed against the fair and decretal order dated 9.12.2011 and 10.12.2011 in unnumbered I.A. in O.S. No. 39 of 2004 the file of learned District Judge, Cuddalore. The appellants are third party petitioners before the first appellate court which is the Principal District Court, Cuddalore. The respondent filed a suit for partition in O.S. No. 19 of 1992 before the Subordinate Judge, Cuddalore. The suit was filed initially against seven defendants who were the children of one Vaithi through his first wife Muthammal. The respondent claimed that he is the only son of the said Vaithi through a second wife Anjalai and therefore, he has become a sharer along with other children of Vaithi and claimed a share.

2. The original defendants resisted the suit by filing a written statement. They denied the claim of the respondent and denied the claim that he is the son through the second wife.

3. The trial court rejected the claim of the respondent. The respondent preferred an appeal in A.S. No. 39 of 2004 before the Principal District Court, Cuddalore. Unfortunately, the defendants in the original suits who were the respondents in that appeal did not appear and they were called absent and set ex-parte.

4. The Appellate Court proceeded to hear the appellant and delivered the judgment on 4.10.2005. The first appellate court found the plaintiff's claim was

proved and granted preliminary decree for partition.

5. It is understood that the respondent initiated proceedings for final decree. In the meantime, the appellants who are the legal heirs of the 4th defendant in the suit named Thaiyalnayaki filed two applications before the Principal District Court, Cuddalore. An application under Order 22 Rule 10 read with sec. 151 of CPC was filed to recognise the appellants as the legal heirs of the one of the deceased defendants and be permitted to prosecute an application filed under Order 41 Rule 21 of Civil Procedure Code. The other application was filed under Order 41 Rule 21 of CPC for rehearing of the appeal which was heard ex-parte. However, both the applications were not numbered and taken on file by the learned Principal District Judge, Cuddalore.

6. The application filed under order 22 Rule 10 of CPC was rejected stating that the "appeal in AS No. 39 of 2004 has been disposed on 4.10.2005 on merits, after full discussion. This interlocutory application shall not be maintainable." The other application filed under order 41 Rule 21 was dismissed stating that "Order 22 Rule 10 Petition rejected. Hence this petition also rejected".

7. Aggrieved by these two orders, the present appeals have been preferred on the ground that the Court below has not properly considered the application for re-hearing and erred in passing a cryptic order without applying its mind.

8. Reiterating the said ground, Mr. R. Muralidharan, learned counsel for the appellants pointed out that under Order 41 Rule 21, the respondent who was set ex-parte can file an application for rehearing the appeal. The learned counsel further pointed out that the appellants are the legal heirs of the fourth defendant in the suit who died subsequently was not at all served with any notice in the appeal and therefore, the appellants have a right to be heard in the appeal.

9. On the contrary, Mr. M.A. Muthalagan, learned counsel for the respondent submitted that the judgment in the appeal was delivered as early as 2005 and, the appellants have preferred to file an application to set aside an ex-parte order only in the year 2011. The learned counsel pointed out that the first appellate court has rightly rejected the applications.

10. Heard and perused the materials available on record.

11. Order 41 Rule 21 reads as follows;

Order XLI. Appeals from Original Decrees

21. Re-hearing on application of respondent against whom ex-parte decree made

Where an appeal is heard ex-parte and judgment is pronounced against the respondent, he may apply to the Appellant Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

12. Under Rule 17(2) of CPC where the appellant appears and the respondent does not appear the appeal shall be heard ex-parte. However, Rule 21 of CPC provides an opportunity to a respondent if he satisfies the court that the notice was not duly served or he was prevented by sufficient cause from appearing when the appeal was called for hearing to rehear the appeal.

13. Order 22 deals with the procedure in case of death of plaintiff or defendant. Rule 10 deals with the cases of assignment, creation or devolution of any interest during the pendency of the suit. The appellants who have devolved an interest in the suit property through their mother viz., the 5th defendant Thaiyalnayaki has filed an application under Order 22 Rule 10 of CPC to continue the proceedings and also sought permission to prosecute an application filed under Order 41 Rule 21 where they have sought for rehearing of the appeal.

14. As rightly pointed out by the learned counsel for the appellant without even numbering the applications the court below has rejected the application filed under Order 22 Rule 10 and consequently the other application filed under Order 41 Rule 21.

15. The reason given by the court below for rejection of the application is that since the appeal was disposed on merits on 4.10.2005, the interlocutory application shall not be maintainable. On the face of it, the orders are not correct and there is no reasoning. However, for rehearing the appeal the condition precedent is that the respondent must satisfy the court that the notice was not duly served or he was prevented from appearing on a sufficient cause.

16. In the affidavit filed by the appellants it is stated that the original respondent/defendant was not duly served with notice. However, the appellants were not given an opportunity to prove the reason as the applications were rejected before even numbering.

17. In any event, it is pertinent to point out that the judgment in the appeal was delivered on 24.10.2005 and the appellants have preferred the applications only on 5.9.2011.

18. Rule 21 of Order 41 was amended by Madras Amendment which runs as follows:

High Court Amendment (Madras) Re number 21 as sub-r: (1) of that rule and add the following as sub-r (2);

(2) The provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to applications under sub-rule (1).

19. Therefore, Limitation Act is applicable for filing an application to rehear the appeal by a respondent, who was set ex-parte in the appeal. The limitation to set aside the ex-parte order is 30 days. Therefore, the respondent, who was set ex-parte in the appeal, ought to have filed an application within 30 days from the date of pronouncement of the judgment or he should have filed an application for

condonation of delay in filing the application to set aside the ex-parte order. In any event, he should have shown sufficient cause for such delay. Therefore, the applications as filed are affected by law of limitation and application under sec. 5 of the Limitation Act was also not filed.

20. As stated earlier, a preliminary decree was passed in the appeal in 2005. The respondent admits in his counter that they have initiated final decree proceedings only in the year 2009. Only thereafter, the appellants who are the legal heirs of the one of the defendants had the knowledge about the preliminary decree. Therefore, they have filed an applications Order 22 Rule 10 of CPC as well as Order 41 Rule 21 of CPC.

21. Under Article, 123 of Limitation Act, 1963 to set aside a decree passed ex-parte or to re-hear and appeal decreed or heard ex-parte, the period of Limitation is 30 days. When Sec. 5 of the Limitation Act is applicable, they should have filed an application to condone the delay in filing such application. Therefore, to meet the ends of justice, this court is of the view that the appellants must be given an opportunity to exercise their right under Sec. 5 of the Limitation Act to condone the delay in filing an application under order 41 rule 21 of CPC. Therefore, it is a fit case to be remanded back to give an opportunity for the appellants to approach the court below properly. For the above reasons, both the appeals are allowed and orders dated 9.12.2011 and 10.12.2011 passed by the learned District Judge, Cuddalore in unnumbered I.A. in O.S. No. 39 of 2004 are set aside and remanded back to court below and the appellants are directed to file an application to condone the delay between the date of judgment of the appeal till the date of filing of their application. On such filing, the court below is directed to order notice to the respondent and if satisfied that there is reasonable cause to proceed with passing of suitable orders and thereafter dispose the application filed under Order 22 rule 10 and order 41 rule 21 CPC accordingly. No costs. Consequently, connected MP is closed.