

(2014) 12 MAD CK 0322

Madras High Court

Case No: C.R.P.(NPD). No. 2669 of 2014 and M.P. No. 1 of 2014

Vijayalakshmi

APPELLANT

Vs

D.R. Mani

RESPONDENT

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**Date of Decision:** Dec. 11, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13

**Hon'ble Judges:** K. Kalyanasundaram, J**Bench:** Single Bench

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### Judgement

@JUDGMENTTAG-ORDER

K. Kalyanasundaram, J.

This Civil Revision Petition is directed against the order passed in I.A.No. 1173 of 2012 in GWOP No. 552 of 2011 by the Family Court, Coimbatore.

2. The petitioner is the respondent in GWOP No. 552 of 2011 filed by the respondent seeking his appointment as natural guardian of the minor children. Due to absence of the petitioner, an exparte decree was passed in favour of the respondent on 10.05.2012. Thereafter, the petitioner filed an application in I.A.No. 1173 of 2012 for condoning the delay of 20 days in filing the application to set aside the exparte decree. The application was resisted by the respondent by filing a counter. The learned Family Court Judge dismissed the same. Aggrieved by the order, the present revision has been filed.

3. Mr.S.Karthikai Balan, learned counsel appearing for the petitioner submitted that the respondent had entered into a Memorandum of understanding dated 26.08.2011 with the petitioner whereby the respondent had agreed to give the custody of the minor children to the petitioner but later by playing fraud on the court, he obtained an exparte decree in the original petition. It is further contended that the counsel for the petitioner before the family court also colluded with the respondent in passing the exparte decree in his favour and that the petitioner had

lodged a complaint against her own counsel and the same was registered in Crime No. 86 of 2011. It is further submitted that the delay in filing the petition has been properly explained by the petitioner, however the trial court adopting hyper technical approach, dismissed the application.

4. Per contra, the learned counsel for the respondent submitted that the petitioner was not only absent for the hearing on 10.05.2012, but for the previous hearings from December 2011 onwards, she was continuously absent and there is no explanation from her. The learned counsel further submitted that the respondent had paid Rs. 50 lakhs to the petitioner as permanent alimony and on that basis, a decree of divorce was also granted in HMOP No. 687 of 2011 and as per the memorandum of understanding dated 28.06.2011, the petitioner had agreed to give custody of the minor children to the respondent but through the forged memorandum of understanding dated 26.08.2011, she claims custody of the minor children. The learned counsel further submitted that the petitioner has now shown sufficient cause for condoning the delay and that even if the delay is condoned, no useful purpose would be served. The contention of the counsel for the respondent is that the order passed in GWOP No. 552 of 2011 is interlocutory in nature and the petitioner, instead of seeking to set aside the order passed in GWOP No. 552 of 2011. She can very well file a separate original petition seeking custody of the minor children.

5. In reply to the above contention, the learned counsel for the petitioner submitted that the application filed for setting aside the exparte decree is maintainable. The learned counsel relied upon the judgment of this Court in CRP NPD Nos. 3856 & 3857 of 2007 [B.Suresh Babu v. Nithya] and an unreported Division Bench judgment of Madhya Pradesh High Court dated 15.02.2006 in Aruna Kumari v. Dr.Ambrish Kumar Sengar. This Court, in the above referred judgments held that interlocutory applications filed before the Family Court to set aside the compromise decree is maintainable. In the decision of Division Bench of Madhya Pradesh High Court cited supra, question arose as to whether the application filed under Order IX Rule 13 CPC to set aside the exparte decree was maintainable and the Division Bench has answered in affirmative.

6. It is seen from the records that the petitioner filed application in I.A.No. 1173 of 2012 to condone the delay of 20 days in filing the petition to set aside the exparte order stating that as per Memorandum of understanding dated 28.06.2011, the respondent agreed to withdraw GWOP No. 552 of 2011 and she was under bonafide impression that the petition would be withdrawn. It is further alleged that the exparte order dated 10.05.2012 was not communicated by her counsel as he had colluded with the respondent herein. She has further alleged that there were life threats to her which delayed her in filing the application. Though the respondent had disputed the contentions of the petitioner, he has not produced any other material to show that the petitioner was deliberately negligent in filing the

application and her inaction was with an oblique motive. In the light of the judgment referred supra, the contention of the respondent that the application itself is not maintainable cannot be countenanced.

7. It is settled law that in considering the application for the delay of few days, the court has to adopt liberal approach unless the delay was deliberate and with an oblique motive. In the case on hand, the original petition was filed seeking appointment of guardian for the minor children Lavanya and Vishwa. The welfare of the minor children is a paramount consideration in deciding the application filed under Guardians and Wards Act. Keeping in mind the above facts, I am of the opinion that the petitioner has shown sufficient cause for condoning the delay.

8. In the result, the civil revision petition is allowed. The order passed in I.A.No. 1173 of 2012 in GWOP No. 552 of 2011 by Family Court, Coimbatore is set aside. No costs. Consequently, connected Miscellaneous Petition is closed.